TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 611.

JAMES A. ARPEY, APPELLANT,

vs.

[illegible] REEVES, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

FILED AUGUST 26, 1915.

(24,534)

1 In the United States District Court of the Southern District of Florida.

UNITED STATES
vs.
J. J. ABBOTT.

To the Honorable Judge of the United States District Court in and for the Southern District of Florida:

Your petitioner, J. J. Abbott, of the city of Tampa, county of Hillsborough, State of Florida, complaining, shows and alleges that he is detained in custody without lawful authority and illegally restrained of his liberty by J. C. Brown, the United States marshal of said district, by virtue of a commitment issued out of said court on the 20th day of March, A. D. 1915, in words and figures as follows:

United States of America, District Court of the United States, Southern District of Florida.

The President of the United States of America to the marshal of the said district and each of his deputies, or either of them, and the warden of the United States Penitentiary at Atlanta, Georgia, greeting:

Whereas James J. Abbott, the defendant, in the case of the United States of America vs. James J. Abbott, having been tried on and indictment and found guilty by a jury for violation of section 195 of the Criminal Code by unlawfully embezzling postal funds as railway mail clerk, and having been sentenced by the court to be confined in the United States Penitentiary at Atlanta, Georgia, for a term of one year and six months:

2 Now, therefore, these are to command you, the said marshal, to deliver the body of the said James J. Abbott to the warden of the United States Penitentiary at Atlanta, Georgia, together with a copy of this writ, and to command you, the said warden, to receive the said James J. Abbott, prisoner of the United States, into your custody and him safely to imprison by confinement at hard labor in the United States Penitentiary at Atlanta, Georgia, for the term of one year and six months, or thence be discharged by due course of law.

Witness the Honorable Rhydon M. Call, judge of the said district court and for the said district, at Tampa, Florida, and the seal thereof, this 20th day of March, A. D. 1915.

E. D. DODGE, *Clerk.*
By W. R. WATKINS.
Deputy Clerk.

That said commitment was issued in pursuance of a sentence imposed by the said court upon your petitioner on the 12th day of March, A. D. 1912, as follows, to wit: The defendant being present, sentence is pronounced, viz: Ordered that J. J. Abbott, having been

indicted and convicted by a jury of violation of section 195 Criminal Code, be confined in the United States Penitentiary at Atlanta, Georgia, for one year and six months.

And your petitioner further alleges unto your honor that no mittimus or committment was issued in this case in pursuance of said judgment and sentence until the 20th day of March, A. D. 1915, as aforesaid. And your petitioner further shows unto your honor and alleges that on March 12th, 1912, the said court was ordered adjourned in the following order, to wit:

3 March 12, 1912, Tuesday, continued.

"Ordered that court be adjourned in accordance with general rule No. 1, and all orders and other matter be entered as by the term.

"Thereupon court is adjourned as ordered."

And your petitioner further alleges and shows unto this honorable court that thereafter the said court was opened in due form of law from day to day until the 26th day of June, A. D. 1912, inclusive, and on the said 26th day of June, A. D. 1912, the said sentence imposed on your petitioner on the 12th day of March, 1912, was, by the said court, set aside and a new trial granted to your petitioner in words and figures as follows, to wit:

"This cause has come on for hearing upon a motion for a new trial upon additional affidavits, and the matter having been considered being such that if the matters therein contained were presented to a petit jury it might raise a reasonable doubt in the minds of the jury as to the guilt of the defendant:

"It is further ordered that the sentence heretofore imposed be set aside, and the said defendant, J. J. Abbott, be granted a new trial.

"It is further ordered that the said bond given by the said J. J. Abbott stand as an appearance bond of the said Abbott until the next term of this court at Tampa, Florida, or until otherwise ordered by the court."

And your petitioner further shows unto this honorable court that the general rule No. 1a under which said court was adjourned on the 12th day of March, 1912, is as follows:

"The law requiring the court to be always open for the transaction of certain kinds of business which may be transacted under the statutes, and under the orders of the judge who may at the time be absent from the place in which the court is held, and which business can be transacted by the clerk under the orders of the judge,

4 and is transacted from day to day in the court, it is ordered that pending the temporary absence of the presiding judge of this district from the district, or the division of the district in which business is presented to be transacted, the clerk be present, either by himself of his deputy, daily, for the transaction of business, and upon such days as there is business to be transacted the court be opened, and that a record of the same be entered upon each of said days upon the minutes."

And your petitioner further shows unto your honor that after the said sentence and before the granting of a motion for a new trial, as aforesaid, he had made and entered into an appeal bond, but never has sued out a writ of error, and no writ of error was ever served or issued or allowed and no appeal has ever been perfected by your petitioner in said case.

And your petitioner further shows unto your honor and alleges that after said petitioner was granted a new trial in said court it was ordered upon motion of the United States attorney, on February 11, 1913, that the said case against J. J. Abbott be set for trial February 9, 1913; that thereafter said case was tried by a jury before said court and resulted in a mistrial on the 26th day of February, A. D. 1913; that thereafter the said case against J. J. Abbott was set for trial by order of said court on the 12th day of March, A. D. 1914, and on said date came on for trial before the said court, and the jury duly empaneled and sworn to try the issues therein, the said jury return a verdict on the 13th day of March, A. D. 1914, in said case against J. J. Abbott, as follows, to wit: "We, the jury, find the defendant not guilty as charged, so say we all." And thereupon the said defendant, J. J. Abbott, was by the said court discharged from said prosecution, and was allowed to depart from said court without day, and discharged from said court without day; that since the acquittal and discharge of the defendant, J. J. Abbott, your petitioner herein, on the 13th day of March, 1914, your petitioner,
5 the said defendant J. J. Abbott, has continuously resided in the city of Tampa, county of Hillsborough, State of Florida, within the jurisdiction of this said court, and has not been and is not a fugitive from justice, and during the entire time since the sentence pronounced upon your petitioner on the 12th day of March, 1912, no mittimus or commitment was ever issued out of or by said court to execute the said sentence until the 20th day of March, A. D. 1915, as aforesaid.

And your petitioner alleges that the said marshal was not authorized, upon and by virtue of the said mittimus or commitment issued on the 20th day of March, A. D. 1915, to arrest your petitioner, and alleges that the arrest of your petitioner was illegal, null, and void, and your petitioner is illegally detained and restrained of his liberty.

Therefore your petitioner prays that a writ of habeas corpus may be granted, directed to the said J. C. Brown, marshal as aforesaid, commanding him to have the body of J. J. Abbott, your petitioner, before your honor at a time and place therein to be specified, to do and receive what shall be then and there considered by your honor concerning said J. J. Abbott, together with the time and cause of his detention and said writ; and that J. J. Abbott, your petitioner, may be restored to his liberty.

Dated this 10th day of May, A. D. 1915.

J. J. ABBOTT, *Petitioner.*

C. P. BARKHILL, attorney for petitioner.

Let writ of habeas corpus issue upon the foregoing petition, returnable before the court Tuesday, the 11th day of May, A. D. 1915, at eleven o'clock a. m.

Done this 10 of May, 1915.

WM. B. SHEPPARD *Judge.*

6 STATE OF FLORIDA,
County of Hillsborough:

Before the undersigned authority personally appeared J. J. Abbott, known to me to be the person described in and who signed the foregoing petition for a writ of habeas corpus, who, being by me first duly sworn, deposes and says that he has read the foregoing petition, and that the matters and things therein contained are true, and that the said petition is true in substance and in fact.

J. J. ABBOTT.

Sworn to and subscribed before me this 10th day of May, A. D. 1915.

C. E. JOHNSON, *Dep. Clerk,*
U. S. District Court, Southern District of Florida.

7 District Court of the United States, Southern District of Florida.

The President of the United States of America:

To the marshal of the said district and each of his deputies, or either of them, and the warden of the United States Penitentiary at Atlanta, Georgia, greeting:

Whereas James J. Abbott, the defendant in the case of the United States of America vs. James J. Abbott, having been tried on an indictment and found guilty by a jury for violation of section 195 of the Criminal Code by unlawfully embezzling postal funds, as railway mail clerk, and having been sentenced by the court to be confined in the United States Penitentiary at Atlanta, Georgia, for a term of one year and six months:

Now, therefore, these are to command you, the said marshal, to deliver the body of the said James J. Abbott to the warden of the United States Penitentiary at Atlanta, Georgia, together with a copy of this writ, and to command you, the said warden, to receive the said James J. Abbott, prisoner of the United States, into your custody and him safely to imprison by confinement at hard labor in the said United States Penitentiary at Atlanta, Georgia, for the term of one year and six months, or thence be discharged by due course of law.

Witness the Honorable Rhydon M. Call, judge of the said district court and for the said district, at Tampa, Florida, and the seal thereof, this 20th day of March, A. D. 1915.

E. D. DODGE, *Clerk.*
By W. R. WATKINS, *Deputy Clerk.*

(Endorsed:) United States District Court, Southern District of Florida. United States vs. J. J. Abbott. Petition and amended petition attached. Filed May 10, 1915. E. D. Dodge, Clerk.

8 United States District Court, Southern District of Florida.

UNITED STATES
vs.
J. J. ABBOTT.

Ex parte J. J. Abbott—Amendment to petition filed by petitioner, James J. Abbott, herein.

Comes now James J. Abbott, petitioner herein, and for an amendment to his petition for the writ of habeas corpus in said matter come up by leave of the said court had and obtained, says:

[5½.]

I am, and ever since my birth have been, a citizen of the United States. I am now, and for some years past have been, a resident of Hillsborough County, in the State of Florida. My aforesaid imprisonment, confinement, and detention are wholly without the authority of, and contrary to, the law and a violation of my rights as a citizen of the United States, and particularly by section one of the thirteenth amendment and fifth amendment of the Constitution of the United States, the protection of which I expressly invoke.

Your petitioner further shows that his detention and imprisonment as aforesaid is illegal in this, to wit: That the commitment under which your petitioner is held is illegal and void.

That your petitioner's imprisonment and detention under said sentence is contrary to the Constitution and laws of the United States, and your petitioner is held in violation of the laws of the Constitution of the United States and without due process of law.

J. J. ABBOTT.

9 STATE OF FLORIDA,
County of Hillsborough:

Before me, the undersigned authority, personally appeared James J. Abbott, petitioner herein, who, being duly sworn, says that he has read the foregoing amendment to his petition by him subscribed and that the same is true.

Sworn to and subscribed to before me this 2nd day of June, 1915.

W. R. WATKINS,
Deputy Clerk, U. S. District Court.

(Endorsed:) United States District Court, Southern District of Florida. Ex parte James J. Abbott. Amendment to petition. Filed as of 11th day of May, A. D. 1915. Nunc pro tunc, E. D. Dodge, clerk, by W. R. Watkins, deputy clerk, this 2nd day of June, A. D. 1915. W. L. Devore, clerk, by W. R. Watkins, deputy clerk.

10 UNITED STATES OF AMERICA,
Southern Ditrict of Florida, ss.

To J. C. Brown, marshal of the said district:

We command you that the body of J. J. Abbott, in your custody detained, as it is said, together with the day and cause of his caption and detention, you safely have before Honorable William B. Sheppard, judge of our district court of the United States,, within and for the district aforesaid, at Jacksonville, Florida, May 11, 1915, at eleven o'clock a. m., to do and receive all and singular those things which the said William B. Sheppard, judge of our said district court, shall then and there consider of him in this behalf, and have you then and there this writ.

Witness the Honorable William B. Sheppard, judge of the District Court of the United States, this 10th day of May, A. D. 1915, and the one hundred and thirty-ninth year of the independence of the United States of America.

Attest:

EUGENE D. DODGE, *Clerk.*

Marshal's return.

Received this writ at Jacksonville, Fla., May 10th, 1915, and executed it same as herein directed by having into court the body of the within named J. J. Abbott. Done in Jacksonville, Florida, this 11th day of May, 1915.

J. C. BROWN, *U. S. Marshal.*
By N. L. PINDER, *Chief Deputy.*

(Endorsed:) United States District Court, Southern District of Florida. United States vs. J. J. Abbott. Habeas corpus write. Filed May 11, 1915. E. D. Dodge, clerk.

11 In the District Court of the United States of America, in and for the Southern District of Florida.

EX PARTE JAMES J. ABBOTT—PETITION FOR WRIT OF HABEAS CORPUS.

The answer to the petition and the return to the writ issued in said matter.

Comes now J. C. Brown, United States marshal for the Southern District of Florida, and for answer to the petition filed by James J. Abbott, in said matter and for a return to the writ issued in accordance with the prayer of said petition says:

First. He admits that he holds the said James J. Abbott by reason of a certain commitment issued by the clerk of said court on the 20th day of March, A. D. 1915, as alleged and set forth in said petition and herewith exhibits to the court the original of said commitment.

Second. Said respondent further admits that said commitment was issued for the execution of a sentence passed upon said petitioner on the 12th day of March, A. D. 1912, directing that said petitioner be confined in the United States penitentiary at Atlanta, Georgia, for a term of one year and six months as alleged in said petition.

Third. Respondent further answering said petition and as a further return to said writ says that after the Hon. James W. Locke, the then presiding judge of said court had passed sentence upon said petitioner, as aforesaid, said petitioner, by his attorneys, on the 11th day of March, A. D. 1912, filed a motion for a new trial, basing said motion on certain alleged newly discovered evidence; that after said judge had duly considered said motion and said alleged
12 newly discovered evidence he, on the 12th day of March, 1912, denied said motion for a new trial and passed sentence upon said petitioner as aforesaid and fixed his supersedeas bond in the sum of $2,000.00, and that said bond was duly given, approved, and filed, and that after denying said motion for a new trial the said judge of said court on the 12th day of March, 1912, adjourned said term of court in accordance with general rule No. 1 set out in petitioner's said petition.

Fourth. Respondent further answering said petition and as a further return to said writ says that after the final adjournment of said term of court as aforesaid and in vacation, the said petitioner having failed to prepare and present his bill of exceptions to the court within the time allowed, and having failed to sue out a writ of error, on May 24th, 1912, filed another motion for a new trial, basing said motion on certain other alleged newly discovered evidence.

Fourth (*a*). Respondent further answering said petition and as a further return to said writ says that after the Honorable James W. Locke, as judge of said court, had adjourned said term of court in accordance with general rule No. 1 as aforesaid, and after said judge had gone to Jacksonville, Florida, the deputy clerk of said court simply noted on the minutes from day to day that court was open in accordance with general rule No. 1, after which said deputy clerk entered in said minutes a record of orders made from time to time by the court in vacation, and that said general rule No. 1 could not and did not authorize the Honorable James W. Locke, after the adjournment of said term of court on the 12th day of March, 1912, as aforesaid, to pass upon and grant said motion for a new trial filed on the 24th day of May, 1912.

Fifth. Respondent further answering said motion and as a further return to said writ admits that on June 26th, 1912, the said James W. Locke, judge of said court, at Jacksonville, Florida, granted said motion filed on said 24th day of May, 1912, and made an order
13 vacating his former order denying new trial as aforesaid, and then and there, at Jacksonville, Florida, on the said 26th day of June, 1912, made an order granting the defendant a new trial, and also directing that the said supersedeas bond be permitted to

stand as an appearance bond, but this respondent says that the Honorable William B. Sheppard, presiding judge of said court, on the 20th day of March, A. D. 1915, held that at the time the said James W. Locke, on the said 26th day of June, 1912, made an order granting a new trial in said cause, as aforesaid, he, the said James W. Locke, had no jurisdiction and no power or authority whatsoever to make said order, for the reason that the term of court at which the said petitioner was sentenced was finally adjourned and ended on the 12th day of March, 1912, as aforesaid.

Sixth. Respondent, further answering said petition and as a further return to said writ, says that in February, 1915, the persons, to wit, E. Wildfong, T. O. Frier, James Whitener, and F. W. Burnsed, who made the affidavits in support of said motion for a new trial, filed on the said 24th day of May, 1912, were indicted for perjury and that said petitioner, to wit, James J. Abbott, was indicted for subornation of perjury, charging him with procuring and suborning said affiants to make said affidavits; that on March 11th, 1915, the said petitioner, by his counsel, demurred to said indictment charging said petitioner, the said J. J. Abbott, with subornation of perjury, and moved to quash the same on the ground that the said James W. Locke, judge of said court, had no jurisdiction to grant said motion for a new trial, because said motion was not filed within four days after verdict; that the Hon. William B. Sheppard, the then presiding judge of said court, after considering said motion to quash said indictment charging said petitioner with subornation of perjury, granted said motion and sustained said demurrer and quashed said indictment on the ground that the said James W. Locke had no power or authority, after the final adjournment of said term of court, as aforesaid, to vacate or set aside the said final judgment and sentence passed on the said petitioner, as aforesaid.

14 Seventh. This respondent, further answering said petition and as a further return to said writ, admits that after the said James W. Locke had granted a new trial to petitioner on said alleged false and perjured affidavits the said petitioner was given another trial on the 11th day of February, 1913, which resulted in a mistrial, and was subsequently tried on March 13th, 1914, and that said last-mentioned trial resulted in a verdict of "not guilty," but this respondent says that the Hon. William B. Sheppard, as judge of said court, in rendering his opinion granting the motion to quash the indictment charging petitioner with subornation of perjury, as aforesaid, held that, inasmuch as the Hon. James W. Locke, as judge of said court, had no jurisdiction to grant a new trial to said petitioner, the said trials of said defendant after his conviction and sentence as aforesaid were coram non judice and were mere nullities and in effect nothing more than moot court proceedings or mock trials.

Eighth. This respondent, further answering said petition and as a further return to said writ, admits that no mittimus or commitment was ever issued out of or by said court for the execution of said sentence until the 20th day of March, A. D. 1915, as aforesaid.

Ninth. This respondent, further answering said petition and as a further return to said writ, says that the petitioner herein, the said James J. Abbott, procured a stay of the issuance and execution of said commitment from the 12th day of March, A. D. 1912, unil the 20th day of March, A. D., 1915, by presenting the false affidavits of the said E. Wildfong, T. O. Frier, James Whitener, and F. W. Burnsed in support of a motion for a new trial after the term of said court held at Tampa, Florida, in March, 1912, had finally adjourned, and is responsible for the said delay in the issuance and execution of said commitment.

J. C. BROWN,
United States Marshal.

15 COUNTY OF DUVAL,
State of Florida.

Before the undersigned authority personally appeared J. C. Brown, United States marshal for the southern district of Florida, who, being duly sworn, says that he has read the foregoing answer and return by him subscribed and that the same is true.

J. C. BROWN.

Sworn to and subscribed before me this 11th day of May, 1915.

[Court seal.] W. L. DEVORE,
Deputy Clerk U. S. District Court,
Southern District of Florida.

(Endorsed:) United States District Court, Southern District of Florida. Ex parte, James J. Abbott. Answer and return. Filed May 11, 1915. E. D. Dodge, Clerk.

16 In the District Court of the United States in and for the Southern District of Florida.

EX PARTE JAMES J. ABBOTT.—PETITION FOR HABEAS CORPUS.

Comes now J. C. Brown, United States marshal in and for the southern district of Florida, and prays the court for an order allowing him to amend his answer and return to the writ of habeas corpus in the above matter, as specified in the attached amendment, and that said order may be made nunc pro tunc as of the 11th day of May, A. D. 1915.

J. CLIFFORD BROWN.

This cause coming on to be heard, it is ordered that the said amendment to the said answer be allowed to be filed as of the 11th day of May, A. D. 1915, in accordance with the above petition.

WM. B. SHEPPARD, *Judge.*

17 In the District Court of the United States of America, in and for the Southern District of Florida.

EX PARTE JAMES J. ABBOTT—PETITION FOR HABEAS CORPUS.

Amendment to answer to the petition filed and the return to the writ issued in said matter.

Comes now J. C. Brown, United States marshal for the Southern District of Florida, and for an amendment to his answer to the petition filed by James J. Abbott in said matter, and for an amendment to the return to the writ issued in accordance with the prayer of said petition, says:

[5½.]

That the said order granting said motion for a new trial and modifying said appeal bond made on June 26, 1912, as aforesaid, by James W. Locke, was made by said James W. Locke in chambers at Jacksonville, Florida, after the expiration of the time allowed in the order made in term time at Tampa for perfecting the appeal of the said James J. Abbott from the aforesaid conviction. That Tampa was, on said 26th day of June, 1912, in the middle division of the Southern District of Florida, and that Jacksonville was on said date in the northern division of the Southern District of Florida.

J. CLIFFORD BROWN.

18 COUNTY OF DUVAL,
State of Florida:

Before the undersigned authority personally appeared J. C. Brown, United States marshal for the Southern District of Florida, who, being duly sworn, says that he has read the foregoing amendment to his answer and return by him subscribed and that the same is true.

J. C. BROWN.

Sworn to and subscribed before me this 19th day of May, 1915.

[NOTARIAL SEAL.] FRED BOTTS,
Notary Public.

(Endorsed:) United States District Court, Southern District of Florida. Ex parte J. J. Abbott. Amendment to answer and return.

19 In the District Court of the United States for the Southern District of Florida, at Jacksonville.

PETITION OF J. J. ABBOTT FOR WRIT OF HABEAS CORPUS.

Be it remembered that on this 19th day of May, A. D. 1915, in obedience to the writ of habeas corpus heretofore allowed by the court on the petition of J. J. Abbott, J. C. Brown, United States marshal for the Southern District of Florida, to whom the said writ was directed, appeared and produced before me at Jacksonville, in

said district, on the 11th day of May, 1915, the body of the said J. J. Abbott, together with the said writ and his return thereon. And it appearing to the court that the said J. J. Abbott was lawfully detained by the said J. C. Brown, United States marshal, for the causes in the said return mentioned, and that the said J. J. Abbott ought not to be discharged by the said writ, but should be remanded to the custody of the said J. C. Brown, it is therefore ordered that the said writ be, and the same is hereby, discharged and the said J. J. Abbott be, and he is hereby, remanded to the custody of J. C. Brown, United States marshal aforesaid.

It is further ordered that if the said J. J. Abbott shall enter his appeal from this order and shall thereupon enter into a good and sufficient recognizance in the sum of two thousand dollars, payable to the United States, conditioned that he will prosecute his said appeal to effect and without delay and shall stand to and abide the final decision of the Supreme Court of the United States, and surrender himself to the marshal, and do and perform all such things as may be required thereby, then the execution of this order of remand be, and the same is hereby, suspended pending said appeal.

20 Done and ordered at Jacksonville this the 19th day of May, A. D. 1915.

WM. B. SHEPPARD, *Judge.*

(Endorsed:) United States District Court, Southern District of Florida. Petition of J. J. Abbott for writ of habeas corpus. Order discharging writ and order remanding to custody of marshal said Abbott. Filed May 19, 1915. E. D. Dodge, clerk.

21 In the District Court of the United States of America, Southern District of Florida.

IN RE APPLICATION OF JAMES J. ABBOTT FOR WRIT OF HABEAS CORPUS.

The above-named James J. Abbott, conceiving himself aggrieved by order entered on the 19th day of May, 1915, in the above-entitled proceeding denying the application for a writ of habeas corpus, doth hereby appeal to the Supreme Court of the United States of America.

Your petitioner further prays that he may be allowed to prosecute such appeal as a poor person, as per his poverty affidavit hereunto annexed, marked Exhibit "A" and made a part of this application.

Your petitioner further prays that such appeal may be allowed: that a transcript of the record and proceedings and papers upon which such order was made, duly authenticated, may be sent to the Supreme Court of the United States of America.

C. B. PARKHILL,
Attorney for Appellant.
JAMES J. ABBOTT,
Petitioner and Appellant.

22 In the District Court of the United States of America in and for the Southern District of Florida.

IN THE MATTER OF JAMES J. ABBOTT, PETITION FOR WRIT OF HABEAS CORPUS. EX PARTE.

UNITED STATES OF AMERICA,
State of Florida, County of Hillsborough:

James J. Abbott, being first duly sworn, says that he desires to perfect an appeal from the decision of this court rendered May 19th, A. D. 1915, to the Supreme Court of the United States; that because of his poverty he is unable to pay the costs of such appeal or give security for the same; that affiant verily believes that he is entitled to the redress he seeks by such appeal, and the affiant verily believes that he is entitled to his discharge in habeas corpus.

J. J. ABBOTT.

Sworn to and subscribed before me this 13th day of July, A. D. 1915.

[NOTARIAL SEAL.] S. H. ROGERS, Jr.

(Endorsed:) In the District Court of the United States for the Southern District of Florida. J. J. Abbott vs. J. C. Brown and United States. Petition for appeal. Filed July 15, 1915. W. L. Devore, clerk.

23 In District Court of the United States of America, in and for Southern District of Florida.

IN RE APPLICATION OF JAMES J. ABBOTT FOR WRIT OF HABEAS CORPUS.

And now, to wit, on this 15th day of July, A. D. 1915, this cause comes on for further consideration upon the application for an appeal, and the poverty affidavit of said James J. Abbott thereunto annexed, and Charles B. Parkhill, attorney for said appellant, appearing in support of such application to prosecute such appeal as a poor person.

It is ordered by the court that the appeal be allowed as prayed for, and that the said James J. Abbott be and he is hereby allowed to prosecute such appeal to the Supreme Court of the United States of America, without being required to prepay fees or costs, as required by act of June 25, 1910.

RHYDON M. CALL, *Judge.*

(Endorsed:) In the District Court of the United States for the Southern District of Florida. J. J. Abbott vs. J. C. Brown and United States, order allowing appeal. Filed July 15, 1915. W. L. Devore, clerk.

24 In the District Court of the United States of America, in and for the Southern District of Florida.

IN RE APPLICATION OF JAMES J. ABBOTT FOR WRIT OF HABEAS CORPUS.

And now comes the above-named James J. Abbott and makes and files this his assignment of errors, to wit:

1. The court erred in refusing and denying the prayer of petition for writ of habeas corpus filed herein by the said James J. Abbott, and in remanding the said James J. Abbott to the custody of the United States marshal.

2. The court erred in and by the order and decree made herein and entered on the 19th day of May, A. D. 1915, in the above-entitled case.

3. The court erred in not holding that the commitment or mittimus issued in the case of United States vs. said James J. Abbott was illegal and void.

4. The court erred in not discharging the said James J. Abbott from the custody of James C. Brown, United States marshal.

5. Petitioner now held in involuntary servitude not as a punishment for any crime against the laws of the United States, or any of its States or Territories, whereof he has been previously duly convicted, in violation of section 1 of Article XIII of amendments to the Constitution of the United States of America.

6. Petitioner now illegally detained, imprisoned, and deprived of his liberty, without due process of law.

25 7. The petitioner, or appellant, James J. Abbott is now illegally detained in prison and deprived of his liberty contrary to the Constitution and laws of the United States.

8. The sentence imposed upon the petitioner and appellant James J. Abbott, and by reason of which he is now detained and restrained of his liberty, has expired, and the said James J. Abbott cannot now be held to serve the same.

9. The United States is estopped from detaining and restraining the said James J. Abbott of his liberty under the alleged sentence imposed upon him and by the commitment under which he is now detained and restrained of his liberty.

10. The petitioner has been duly acquitted of his liberty charged against him and is illegally restrained of his liberty, contrary to the Constitution and laws of the United States.

11. The sentence imposed upon petitioner on the 12th day of March, A. D. 1912, should be declared null and void.

12. For other errors appearing upon the record.

Whereas, by the law of the land, the said writ of habeas corpus should have been granted and the prisoner, James J. Abbott, should have been discharged and given his liberty, as prayed for in his petition for writ of habeas corpus.

And the said James J. Abbott prays that the order and judgment aforesaid may be reversed, annulled, and held for naught, and for such other relief as may be proper in the premises.

CHARLES B. PARKHILL,
Attorney for James J. Abbott, Petitioner & Appellant.

(Endorsed:) In the United States District Court in and for Southern District of Florida, James J. Abbott vs. J. C. Brown, United States marshal, assignment of errors. Filed July 15, 1915. W. L. Devore, clerk.

26 In the District Court of the United States within and for the Southern District of Florida.

IN THE MATTER OF THE APPLICATION OF JAMES J. ABBOTT, EX PARTE.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to James C. Brown, Esq., United States marshal in and for the Southern District of Florida, at Jacksonville, Florida, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of Florida, and filed in the office of the clerk of the District Court of the United States, within and for the Southern District of Florida, on the 15 day of July, A. D. 1915, in a cause wherein James J. Abbott is appellant and you, James C. Brown, as United States marshal in and for the Southern District of Florida, are appellee, to show cause, if any there be, why the judgment, order, or decree of said district court rendered on the 19th day of May, A. D. 1915, against the said appellee, remanding the said James J. Abbott upon writ of habeas corpus to your custody should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Rhydon M. Call, judge of the District Court of the United States, in and for the Southern District of Florida, this 30th day of July, A. D. 1915.

RHYDON M. CALL,
United States District Judge.

27 Service of a copy of above and within citation is hereby admitted this 4th day of August, A. D. 1915.

J. CLIFFORD BROWN,
United States Marshal in and for the Southern District of Florida, Appellee.

(Endorsed:) United States District Court, Southern District of Florida, J. J. Abbott vs. J. C. Brown, U. S. marshal, and United States of America. Citation. Filed July 30th, 1915, W. L. Devore, clerk.

28 In the District Court of the United States of America in and for the Southern District of Florida.

IN RE APPLICATION OF JAMES J. ABBOTT FOR WRIT OF HABEAS CORPUS.

Notice.

To Hon. H. S. PHILLIPS,
United States district attorney, southern district of Florida:

You will please take notice that I am, on this 20th day of July, A. D. 1915, filing in the office of the clerk of the District Court of the United States in and for the Southern District of Florida the attached præcipe, or directions to the clerk, for the praparation of the record for the Supreme Court of the United States of America.

CHARLES B. PARKHILL,
Attorney for Appellant.

Received a copy of the above notice and the directions to the clerk this 20th day of July, A. D. 1915.

H. S. PHILLIPS,
District Attorney.

29 In the District Court of the United States of America in and for the Southern District of Florida.

IN RE APPLICATION OF JAMES J. ABBOTT FOR WRIT OF HABEAS CORPUS.

To W. L. Devore, Esquire, Clerk of said Court:

You will please prepare a transcript of the record of the above-styled cause for transmission to the Supreme Court of the United States of America, and in preparing same you will please copy at length into such record the following pleadings, proceedings, and orders, to wit:

1st. Citation on appeal and service.
2nd. Petition for writ of habeas corpus.
3rd. Order granting writ of habeas corpus.
4th. Writ of habeas corpus.
5th. Amendment of petition for writ of habeas corpus.
6th. Return and answer of United States marshal to petition.
7th. Amendment of answer of United States marshal to petition.
8th. Order remanding petitioner to United States marshal.
9th. Application for an appeal.
10th. Exhibit A, poverty affidavit.
11th. Order granting leave to prosecute appeal as poor person.
12th. Assignment of errors.
12½. These directions to clerk.
13th. Clerk's certificate to transcript.

CHAS. B. PARKHILL,
Attorney for Appellant.

30 (Endorsed:) The United States of America, Southern District of Florida, James J. Abbott vs. United States, J. C.

Brown, U. S. marshal. Præcipe and instructions to clerk to preparation of transcript of record. Filed this 20th day of July, A. D. 1915. W. L. Devore, clerk, by W. R. Watkins, deputy clerk.

31 In the District Court of the United States in and for the Southern District of Florida.

IN RE MATTER OF JAMES J. ABBOTT, EX PARTE.

I, W. L. Devore, clerk of the District Court of the United States in and for the Southern District of Florida, do hereby certify that the foregoing and attached printing and writing is a true, full, correct, and complete copy of the record of all proceedings and assignments of error filed in the matter of the application of James J. Abbott, appellant, for writ of habeas corpus, to be directed to James C. Brown, United States marshal in and for the Southern District of Florida, James J. Abbott, appellant, against James C. Brown, United States marshal in and for the Southern District of Florida, appellee, as the same appear of record and on file in this office.

I further certify that the original citation, with acknowledgments of service thereon, is attached hereto and returned herewith in the stead of a copy thereof.

In witness whereof I have hereunto set my hand and the seal of the said District Court at the city of Jacksonville, Florida, this 10th day of August, A. D. 1915.

[SEAL.] W. L. DEVORE,
Clerk U. S. Court in and for So. Dist. of Florida.

32 In the District Court of the United States within and for the Southern District of Florida.

IN THE MATTER OF THE APPLICATION OF JAMES J. ABBOTT, EX PARTE.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James C. Brown, Esq., United States marshal in and for the Southern District of Florida, at Jacksonville, Florida, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of Florida, and filed in the office of the clerk of the District Court of the United States, within and for the Southern District of Florida, on the 15 day of July, A. D. 1915, in a cause wherein James J. Abbott is appellant and you, James C. Brown, as United States marshal in and for the Southern District of Florida, are appellee, to show cause, if any there be, why the judgment, order, or decree of said district court, rendered on the 19th day of May, A. D. 1915, against the said

appellee, remanding the said James J. Abbott, upon writ of habeas corpus, to your custody, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Rhydon M. Call, judge of the
33 District Court of the United States in and for the Southern District of Florida, this 30th day of July, A. D. 1915.

RHYDON M. CALL,
United States District Judge.

Service of a copy of above and within citation is hereby admitted this 4th day of Aug., A. D. 1915.

J. CLIFFORD BROWN,
United States Marshal in and for the Southern District of Florida, Appellee.

34 [United States District Court, Southern District of Florida. J. J. Abbott vs. J. C. Brown, United States mar. Citation. Filed Jul. 30, 1915. W. L. Devore, clerk. Entered pg. 247, D. C. O. B., 1913.]

[File No. 24894. S. Florida. D. C. U. S. Term No. 611. James J. Abbott, appellant, vs. James C. Brown, United States marshal in and for the Southern District of Florida. Filed August 26, 1915. File No. 24894.]

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

JAMES J. ABBOTT, APPELLANT,
v.
JAMES C. BROWN, UNITED STATES MARSHAL for the Southern District of Florida. } No. 611.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

MOTION TO ADVANCE.

Comes now the Solicitor General, and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

This is an appeal *in forma pauperis* from an order of the District Court of the United States for the Southern District of Florida discharging a writ of *habeas corpus* theretofore issued by said district court.

On March 7, 1912, appellant was convicted in the middle division of said court sitting at Tampa, Fla., Hon. James W. Locke presiding, of embezzling a registered package of the value of $10,000 intrusted to him as a railway mail clerk, in violation of section 195 of the Criminal Code.

On March 11, 1912, appellant filed a motion for a new trial. On March 12, 1912, said motion for a new trial was denied and appellant was sentenced to serve one year and six months in the United States penitentiary at Atlanta, Ga., and supersedeas bond fixed at $2,000, which was duly given by appellant and approved and filed. After the imposition of sentence Judge Locke adjourned said court on said 12th day of March, 1912, and returned from Tampa to Jacksonville, which was then in the northern division of said district.

Thereafter appellant instead of suing out a writ of error filed another motion for a new trial on May 24, 1912, basing the same on certain alleged newly discovered evidence.

On June 26, 1912, Judge Locke, in vacation and after a consideration of said motion filed on May 24, 1912, made an order vacating his former order denying a new trial and granting a supersedeas bond; also, granting appellant a new trial and directing that the supersedeas bond given by appellant be permitted to stand as an appearance bond.

On February 11, 1913, appellant was again tried, which trial resulted in a mistrial.

On March 13, 1914, appellant was again placed on trial, which trial resulted in a verdict of "not guilty," and appellant was discharged.

In February, 1915, the persons who made the affidavits in support of the motion for a new trial, which was granted on June 26, 1912, were indicted for perjury, and appellant was also indicted for suborna-

tion of perjury, charging him with procuring and suborning said affiants to make said affidavits. Appellant demurred to the indictment charging him with subornation of perjury, and moved to quash the same on the ground, *inter alia*, that Judge Locke had no jurisdiction to grant the motion for a new trial made on May 24, 1912, because the same was not filed within four days after the rendition of the verdict. The Honorable William B. Sheppard, then presiding, granted the motion, sustained the demurrer, and quashed said indictment on the ground that Judge Locke had no power or authority, after the final adjournment of court on March 12, 1912, to vacate or set aside the final judgment and sentence passed on appellant, and the affidavits moving him thereto were therefore *coram non judice*.

After the ruling quashing the indictment for subornation of perjury the United States Attorney for the Southern District of Florida directed the clerk to issue a commitment for the sentence imposed upon appellant on the original conviction, to wit, on March 12, 1912. The commitment issued on March 20, 1915, and appellant was taken into custody.

Thereupon appellant sued out a writ of *habeas corpus* on the grounds *inter alia:*

1. That his arrest under the mittimus issued March 20, 1915, was illegal, null and void.

2. That his detention and imprisonment thereunder violates section one of the Thirteenth Amendment, also the Fifth Amendment to the Constitution, in that he is being held without due process of law.

The writ of *habeas corpus* issued, appellant was brought into court and the marshal filed his answer in which he alleged *inter alia:*

1. That general rule No. 1 of the District Court of the Southern District of Florida, pursuant to which said district court had adjourned on March 12, 1912, did not authorize Judge Locke, after adjournment, to pass upon and grant the motion for a new trial presented on May 24, 1912.

2. That Judge Sheppard, in sustaining the demurrer and granting the motion to quash the indictment against appellant for subornation of perjury on the ground that Judge Locke was without jurisdiction to enter the order of June 26, 1912, granting the motion for a new trial, held in effect that inasmuch as Judge Locke had no jurisdiction to grant said new trial, the trials after the conviction and sentence of appellant were *coram non judice* and in effect nothing more than moot court proceedings or mock trials.

The writ of *habeas corpus* was discharged, an appeal *in forma pauperis* to this court was allowed by the district court, and appellant is now at large on bail.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1915.

○

No. 611

In the Supreme Court of the United States

October Term, 1915

JAMES J. ABBOTT, Appellant

vs.

JAMES C. BROWN, United States Marshal, Appellee

On Appeal From the United States District Court
of Florida
HONORABLE RHYDON M. CALL, Judge

Application to Prosecute Appeal as a Poor Person

CHARLES B. PARKHILL,
Attorney for Appellant.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

JAMES J. ABBOTT, Appellant

vs.

JAMES C. BROWN, United States Marshal, Appellee

On Appeal From the United States District Court
of Florida
HONORABLE RHYDON M. CALL, Judge

APPLICATION TO PROSECUTE APPEAL AS A POOR PERSON

Comes now the above named appellant, by his attorney Charles B. Parkhill, Esq., a duly admitted, licensed and practicing attorney and counselor of this Honorable Court, and respectfully represents and shows to this Honorable Court:

That heretofore, on or about the 10th day of May A. D., 1915, the said James J. Abbott caused to be filed in the office of the clerk of the District Court of the United States and for the Southern District of Florida a certain application for a writ of habeas corpus, and thereupon the Judge of said Court did issue the said writ of habeas corpus, directed to James C. Brown, Esq., United States Marshal in and for the Southern District of Florida, to safely have before the said Judge the body of the said James J. Abbott, together with the day and cause of his caption and detention, to do and receive all and singular those things which

the said Judge shall then and there consider of him in this behalf.

That thereafter, on said 11th day of May, 1915, the said James C. Brown, United States Marshal, made his return.

That thereafter, on said 11th day of May, 1915, said cause was argued orally and submitted on briefs.

That thereafter, on the 19th day of May, 1915, the said District Court entered an order remanding the said petitioner, James J. Abbott, to the custody of the said James C. Brown, United States Marshal, and refused to discharge the said petitioner, James J. Abbott, from the custody of the said James C. Brown.

That thereafter, on or about the 15th day of July, 1915, upon proper application, the said District Court granted said James J. Abbott an appeal to this Honorable Court, and permitted the said James J. Abbott to prosecute such appeal as a poor person, and that the said district judge issued a citation, directed to said marshal, returnable as required by law, which said citation was duly served and filed in said District Court.

That your petitioner has no money or property with which to pay the costs and expenses of prosecuting such appeal, and for the filing in this Honorable Court.

That your petitioner verily believes that he has a just and meritorious case, and that said judgment of the District Court of Florida should be reversed and remanded with directions to grant the prayer of the said petitioner, James J. Abbott, and to discharge him from the custody of the said James C. Brown, United States Marshal, and that unless he be allowed to prosecute such appeal as a poor person, he will be wholly deprived of his right to have such judgment reviewed in this Honorable Court, and of

his Constitutional right to be released from such illegal imprisonment.

Wherefore, the petitioner prays that he may be allowed to prosecute such appeal as a poor person, as provided by an Act of Congress, approved June 25, 1910, and your petitioner will ever pray, etc.

CHARLES B. PARKHILL,
Attorney for Appellant.

UNITED STATES OF AMERICA,
STATE OF FLORIDA,
COUNTY OF HILLSBOROUGH, } ss.

James J. Abbott, being first duly sworn, says, that the statements of fact contained in the above and foregoing application are true.

J. J. ABBOTT.

Subscribed and sworn to before me, this 15th day of Sept., 1915.

S. H. ROGERS, JR.,
Notary Public, Hillsborough County, Florida.

My commission expires .....

4

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 611.

JAMES J. ABBOTT, APPELLANT,

vs.

JAMES C. BROWN, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF FLORIDA.

REPLY BRIEF FOR APPELLANT.

CHARLES B. PARKHILL,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 611.

JAMES J. ABBOTT, APPELLANT,

vs.

JAMES C. BROWN, UNITED STATES MARSHAL IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF FLORIDA.

REPLY BRIEF FOR APPELLANT.

I.

a. While the return does not admit the averment of the petition that the United States Attorney moved for trial setting the first retrial (the mistrial) the return does not deny that allegation and the same will be accepted as true. Whitten *vs.* Tomlinson, 160 U. S., 231; 16 S. Ct., 297; 40 L. Ed., 406.

b. No leave was required to file the second motion for new trial. Even if leave to file were required, the objection only goes to the regularity of the procedure. The court granted the motion, and subsequently the United States District Attorney made a motion to place the defendant on trial, and he was tried and acquitted, and discharged without delay.

R., 3.

c. Rule No. 1 kept the court open *"for the transaction of business,"* and the adjournment order of March 12 provided, "all orders and other matters be entered *of the term.*" (Italics mine.)

Rule No. 1, therefore, kept the court open for the transaction of business generally that might be transacted without the aid of a jury, not only *certain* kinds of business which may be transacted under the *statutes,* but under the *orders of the judge* who may be temporarily absent. The judge may hear a motion for new trial without the aid of a jury, and his order thereon would be, and was, under the adjournment order, entered as of the term.

II.

a. An estoppel may not be raised in criminal cases. It has no application to criminal causes. The accused may show the actual state of facts, notwithstanding what he may have said or done.

Hughes, Cr. Law & Proc., §§ 537, 3185.
Gillette, Indirect & Col. Ev., § 119.
State *vs.* Hutchinson, 60 Iowa, 478.
Jackson *vs.* Peo., 126 Ill., 144.
Moore *vs.* State, 53 Nebr., 831.
Bailey *vs.* State, 57 Nebr., 706, 710.

The cases cited by counsel for appellee, 106 Cal., 173, 187; State *vs.* Spaulding, 24 Kans., 1, 9; State *vs.* District

Court, 78 Pac., 769, and State *vs.* O'Brien, 94 Tenn., 79, only hold that the defendant, having received a draft or money as treasurer of an association, and the like, may be estopped from saying the proceeds were not moneys of the association.

These cases do not apply here. The citation from 2 Coke's Institutes, volume 1, page 39, is not in point at all. That was not in a criminal case. I hope the court will read it and see how weak is the contention of counsel who cite it.

Estoppels cannot alter the law of the land. The contention of the defendant in the perjury and *habeas corpus* proceedings relate only to what the law is. It is the duty of the court to know and declare the law.

Even if estoppels may be raised in criminal cases, it cannot apply to the contention of appellant that the court lost jurisdiction over this case by his subsequent acquittal and discharge, because that contention rests here upon the contention made by defendant in the perjury case that Judge Locke had no power or authority to act upon and grant the motion for new trial.

Estoppel would only apply to the contention that the court could not act upon motion for new trial made more than four days after verdict. Abbott never did contend that the District Court was adjourned *sine die* under Rule No. 1.

b. The indefinite suspension of sentence loses the jurisdiction. Hughes Cr. Law, § 2568.

The instant case is more than a suspension of execution of sentence.

In *Ex parte* Clendenning, 22 Oklahoma, 108; 97 Pac., 650, the first headnote is:

"Criminal law—sentence and commitment—jurisdiction after discharge. When a judgment of imprisonment is imposed by a court on plea of guilty or *conviction* in a criminal case, and the same is not stayed as provided by law, the defendant should forthwith be committed to the proper offi-

cer for incarceration, and when this is not done *the court makes an order under which the defendant is discharged from custody;* it has *no power or* jurisdiction, after the lapse of the time involved in the sentence and after the term, to issue commitment on such judgment." The subsequent case of *Ex parte* Eldridge, 106 Pac., 980, is not in point and does not qualify or limit it.

See also

In re Webb, 89 Wis., 364.

CONCLUSION.

Counsel for appellee draws on his imagination and asserts that "Abbott committed two crimes. By his shifting tactics he has thus far escaped all punitive consequences." If that argument had been made to the Supreme Court of Florida when I was a member of it, I should have said to counsel, "The defendant is presumed innocent until convicted. He has been acquitted of one crime and has not been tried for the other."

CHARLES B. PARKHILL,
Attorney for Appellant.

No. 611

IN THE

Supreme Court of the United States

October Term, 1915

JAMES J. ABBOTT, Appellant

vs.

JAMES C. BROWN, United States Marshal,
In and for the Southern District of Florida, Appellee

On Appeal From the United States District Court of the Southern District of Florida

BRIEF FOR APPELLANT

CHARLES B. PARKHILL,
Attorney for Appellant.

No. 611

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

JAMES J. ABBOTT, Appellant
vs.
JAMES C. BROWN, United States Marshal,
In and for the Southern District of Florida, Appellee

On Appeal From the United States District Court of the Southern District of Florida

BRIEF FOR APPELLANT

STATEMENT

The petitioner, James J. Abbott, was indicted, tried and convicted in the United States District Court in and for the Southern District of Florida for the violation of Section 195 Criminal Code by unlawfully embezzling postal funds, as railway mail clerk. On the 11th day of March, A. D. 1912, the then defendant, James J. Abbott, who is petitioner and appellant here, filed a motion for a new trial which was denied by the court, who, on the 12th day of March, 1912, passed sentence upon the defendant, James J. Abbott, that he be confined in the United States Penitentiary at Atlanta, Georgia, for a term of one year and six months, and the court fixed supersedeas bond in the sum of Two Thousand ($2,000) Dollars, which was given, approved and filed, but Abbott never sued out a writ of error from said sentence or judgment, and no writ of error was ever issued or served or allowed, and no appeal was ever perfected in said case, no mittimus or commitment was issued by said court to execute or carry out said sentence until the 20th day of March, A. D. 1915, when the commitment or mittimus under which this petitioner is now held was issued, a copy of which is set out in the petition and attached to the answer. On the 12th day of March, 1912, the said court was ordered adjourned in the following order, set out in the petition and admitted by the answer, to-wit:

"March 12th, 1912, Tuesday, continued.

"Ordered that court be adjourned in accordance with General Rule No. 1, and all orders and other matters be entered as of the term.

"Thereupon court is adjourned as ordered."

The said court was opened in due form of law from day to day until the 26th day of June, A. D. 1912, inclusive, and on that day the defendant, who is appellant here, made a motion for a new trial, and the said sentence imposed upon the defendant on the 12th day of March, 1912, was, by the said court, set aside and a new trial granted in words and figures as follows, to-wit:

"This cause has come on for a hearing upon motion for a new trial upon additional affidavits and the matter having been considered being such that if the matters therein contained were presented to a petit jury it might raise a reasonable doubt in the minds of the jury as to the guilt of the defendant.

"It is further ordered that the sentence heretofore imposed be set aside, and the said defendant, James J. Abbott, be granted a new trial.

"It is further ordered that the said bond given by the said James J. Abbott stand as an appearance bond of the said Abbott until the next term of this court at Tampa, or until otherwise ordered by the court."

Thereafter at February Term, 1913, of said court, it was ordered by said court, *upon motion of the United States attorney* on February 11th, 1913, that the said case against James J. Abbott be set for trial; and the said case was tried by a jury before said court and resulted in a mistrial on the 26th day of February. Thereafter the said case came on for trial on the 12th day of March, 1914, at March Term, 1914, and the jury in said case returned a verdict on the 13th day of March, A. D. 1914, as follows: "We, the jury, find the defendant not guilty as charged, so say we all." Thereupon the defendant, James J. Abbott, was by the court discharged from said prosecution and was allowed to depart from said court without day, and discharged from said court without day; and since the acquittal and discharge of the said defendant, he has continuously resided in the City of Tampa, County of Hillsborough, State of Florida, within the jurisdiction of said court, and has not been, and is not now a fugitive from justice, and during the entire time since the sentence pronounced upon him on the 12th day of March, 1912, no mittimus or commitment was ever issued out of or by said court to execute the said sentence until the 20th day of March, A. D. 1915, the same being the mittimus under which this petitioner is now held. The petition, as amended, further shows and alleges that the said James J. Abbott is a citizen of the United States, is entitled to the protection of the Constitution of the United States, and that his detention and imprisonment is illegal and void and contrary to the Constitution and Laws of the United States, and he is held in violation of the Constitution of the United States without due process of law.

The above facts are not denied, but admitted to be true by the answer or return filed by Jas. C. Brown, United States Marshal, herein;

but the respondent, Brown, alleges in his answer and return to the writ issued herein that after the Honorable Jas. W. Locke, as judge of said court had adjourned said term of court in accordance with General Rule No. 1 as aforesaid, and after said judge had gone to Jacksonville, Florida, the deputy clerk of said court simply noted on the minutes, from day to day, that court was open in accordance with General Rule No. 1, after which said deputy clerk entered on said minutes and record orders made, from time to time, by the court, in vacation, and alleges that said General Rule No. 1 could not, and did not, authorize the Honorable Jas. W. Locke, after the adjournment of saidterm of court on the 12th day of March, 1912, as aforesaid, to pass upon and grant said motion for a new trial filed on the 24th day of May, 1912.

The respondent, Brown, further alleges in his answer and return that in February, 1915, certain persons, who made affidavits in support of the motion for a new trial filed by the defendant, Abbott, on the 24th day of May, 1912, were indicted for perjury and Abbott was indicted for subornation of perjury, that on March 11th, 1915, Abbott demurred to the indictment against him and moved to quash the same on the ground that the said Jas. W. Locke, judge as aforesaid, had no jurisdiction to grant said motion for a new trial because said motion was not filed within four days after the verdict, and that Honorable William B. Shepard, the then presiding judge of said court, after considering said motion to quash the said indictment charging the said Abbott with subornation of perjury, granted said motion and sustained said demurrer and quashed said indictment on the ground that the said Jas. W. Locke had no authority or power, after the final adjournment of said court as aforesaid, to vacate or set aside the said final judgment and sentence passed on the said petitioner.

The respondent further allegesthat Abbott procured a stay of the issuance and execution of said commitment from the 12th day of March, 1912, until the 20th day of March, 1915, by presenting the false affidavits of certain persons made in support of his motion for a new trial.

In an amendment of Brown's answer and return, it is alleged that the order granting the motion for a new trial on the 26th day of June, 1912, by Jas. W. Locke, judge, was made by him in chambers at Jacksonville, Florida, after the expiration of the time allowed in the order made in term time at Tampa for perfecting the appeal of Abbott, and that Tampa was, on the 26th day of June, 1912, in the middle division of the Southern District of Florida, and that Jacksonville was, on said date, in the Northern Division of the Southern District of Florida.

On the 11th day of May, 1915, United States Marshal Jas. C. Brown appeared and produced the person of Jas. J. Abbott, at Jacksonville, Florida, before Honorable William B. Shepard, then presiding

in the U. S. District Court of the Southern District of Florida. This cause came on to be heard before Judge Shepard upon the petition for the writ of habeas corpus and the return thereto; and he made his order, which will be found on pages 10 and 11 of the Transcript of the Record, and remanded the petitioner to the custody of Jas. C. Brown, United States Marshal.

From this order, appellant entered his appeal to this court, as shown on page 11 of the Transcript of the Record.

On the 15th day of July, 1915, appellant filed his assignement of error, page 13 of the Transcript of the Record, as follows:

"1. The court erred in refusing and denying the prayer of petition for writ of habeaus corpus filed herein by the said Jas. J. Abbott, and in remanding the said Jas. J. Abbott to the custody of the United States Marshal.

"2. The court erred in and by the order and decree made herein and entered on the 19th day of May, A. D. 1915, in the above entitled case.

"3. The court erred in not holding that the commitment or mittimus issued in the case of United States vs. James J. Abbott was illegal and void.

"4. The court erred in not discharging the said Jas. J. Abbott from the custody of James C. Brown, United States Marshal.

"5. Petitioner now held in involuntary servitude not as a punishment for any crime against the laws of the United States, or any of its States or Territories, whereof he has been previously duly convicted, in violation of Section 1 of Article XIII of Amendments to the Constitution of the United States of America.

"6. Petitioner now illegally detained, imprisoned, and deprived of his liberty, without due process of law.

"7. The petitioner, or appellant, James J. Abbott, is now illegally detained in prison and deprived of his liberty contrary to the Constitution and Laws of the United States.

"8. The sentence imposed upon the petitioner and appellant, James J. Abbott, and by reason of which he is now detained and restrained of his liberty, has expired, and the said James J. Abbott cannot now be held to serve the same.

"9. The United States is estopped from detaining and restraining the said James J. Abbott of his liberty under the alleged sentence imposed upon him and by the commitment under which he is now detained and restrained of his liberty.

"10. The petitioner has been duly acquitted of the crime charged

against him and is illegally restrained of his liberty, contrary to the Constitution and Laws of the United States.

"11. The sentence imposed upon petitioner on the 12th day of March, A. D. 1912, should be declared null and void.

"12. For other errors appearing upon the record.

"Whereas, by the law of the land, the said writ of habeas corpus should have been granted and the prisoner, James J. Abbott, should have been discharged and given his liberty, as prayed for in his petitioner for writ of habeas corpus.

"And the said James J. Abbott prays that the order and judgment aforesaid may be reversed, annulled, and held for naught, and for such other relief as may be proper in the premises."

ARGUMENT

I.

The first contention is, that the sentence imposed upon the defendant, Abbott, cannot be enforced because it was set aside by the trial court, a new trial granted and the defendant, afterwards, acquitted of the crime charged against him. These facts are admitted to be true by the answer and return made by the respondent; but the Government contends, and the answer of the respondent alleges, "that at the time the said James W. Locke, on the said 26th day of June, 1912, made an order granting a new trial in said cause, as aforesaid, the said James W. Locke had no jurisdiction and no power or authority whatsoever to make said order, for the reason that the term of court at which the said petitioner was sentenced was *finally* adjourned and ended on the 12th day of March, 1912, as aforesaid."

I contend there was no final adjournment of the court on the 12th day of March, 1912, and that Judge Locke acted and set the sentence aside and granted the motion for new trial during the same term of court in which the defendant, Abbott, was convicted.

The facts shown and admitted to be true by the record here are:

The appellant was convicted and sentenced on the 12th day of March, 1912, in the United States District Court in and for the Southern District of Florida, at Tampa; and after that, and on the same day, the court was ordered adjourned in the following order:

"Ordered that court be adjourned in accordance with General Rule No. 1, and all orders and other matter be entered as of the term. Thereupon court is adjourned as ordered." Page 2 of transcript.

Rule No. 1 is as follows:

"The law requiring the court to be always open for the transaction of certain kinds of business which may be transacted under the statutes, and under the orders of the judge who may at the time be absent from

the place in which the court is held, and which business can be transacted by the clerk under the orders of the judge, and is transacted from day to day in the court, it is ordered that pending the temporary absence of the presiding judge of this district from the district, or the division of the district in whch busness is presented to be transacted, the clerk be present, either by himself or his deputy, daily, for the transaction of business, and upon such days as there is business to be transacted the court be opened, and that a record of the same be entered upon each of said days upon the minutes."

This record further shows that thereafter the said court was opened *iin due form of law from day to day until the 26th day of June,* 1912, *inclusive,* on which day the sentence imposed upon defenidant was set aside, page 2 of transcript; and respondent admits this to be true and alleges further, in his answer, that after the judge had gone to Jacksonville, Florida, the deputy clerk of said court simply noted on the minutes from day to day that court was open in accordance with General Rule No. 1, after which said deputy clerk entered in said minutes a record of orders made from time to time by the court in vacation. Page 7 of transcript.

The statutes of the United States provide that the terms of the United States District Court for the Southern District of Florida shall be held at Tampa on the second Monday in February; at Jacksonville on the first Monday in December. Section 76 of the Judicial Code of the United States.

U. S. Rev. Stat. Sec. 658, U. S. Comp. Stat. 1901, p. 531. Section 612 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 494) provides that the circuit courts of the United States can be held at the same time in different districts of the same circuit. Section 672 (U. S. Comp. Stat. 1901, p. 546) provides that if neither of the judges of the circuit court be present to open and adjourn any regular or adjourned special session, either of them may, by a written order, directed alternatively to the marshal, and, in his absence, to the clerk, adjourn the court from time to time, as the case may require, to any time before the next regular term.

The purpose of the law, as declared by this court, in Harlan v. McGourin, 218 U. S. 442, was to provide for a statutory term of court, which term should continue until the beginning of the next term, unless *finally* adjourned in the meantime. Such is the general and recognized practice in the Circuit Courts of the United States.

> East Tennessee Iron & Coal Co. v. Wiggins, 15 C. C. A. 510, 37 U. S. App. 129, 68 Fed. 446.

Under similar facts, the court said, in Harlan v. McGourin, *supra*: "There was certainly no adjournment of the court for the term when the

judge was absent, holding court at Tallahassee, or was out of the State. There was an attempt, at least, to keep the court open pending the absence of the presiding judge by the adjournments in pursuance of rule 13.

"Nor do we find anything in the objections made to the manner in which the record of the sessions was kept, which it is unnecessary to examine in further detail, it being sufficient to say that we think the court that sat in November, 1906, was legally in session, with authority to proceed against the accused."

The defendant Abbott was tried and convicted in March, 1912, at the term of the United States District, which began, as we have seen, on the second Monday in February, 1912; and in United States v. Pitman, the court said:

"After the term of a court has been regularly opened upon the day provided by law, the question how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall be opened for incidental business after the regular business of the court has been concluded, is a matter which vests in the discretion of the presiding judge."

In ex parte Lang, 18 Wall. (U. S.) 192, the court said:

"Every term continues until the call of the next succeeding term, unless previously adjourned *sine die;* and until that time the judgment may be modified or stricken out."

Noonan v. Bradley, 12 Wall. 129;
King v. Justices, 1 Maule and S. 442;
Ex Parte Friday, 43 Fed. text 918.

It clearly appears, from the record in the instant case, that the court at which the defendant was convicted was not adjourned *sine die*, but adjourned in pursuance of provisions of Rule No. 1, and remained open from day to day until the sentence was set aside and a new trial granted. The very language of the order of adjournment shows the court was not adjourned *sine die* or finally.

The appellant's motion for a new trial was acted upon and granted in term time, at a lawful term of the United States District Court for the Southern District of Florida.

Florida v. Charlotte Harbor Phosphate Co., 17 C. C. A. 472, 30 U. S. App. 535, 70 Fed. Cas. 885;

East Tennessee Iron & Coal Co. v. Wiggin, 15 C. C. A. 510, 37 U. S. App. 129, 68 Fed. 446;

United States v. Finnell, 185 U. S. 236, 242, 46 L. ed. 890, 892, 22 Sup. Ct. Rep. 633;

United States v. Pitman, 147 U. S. 669, 671, 37 L. ed. 324, 325, 13 Sup. Ct. Rep. 425;

Hume v. Bowie, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582;

McDowell v. United States, 159 U. S. 596, 600, 40 L. ed. 271, 173, 16 Sup. Ct. Rep. 111;
Bronson v. Shulten, 104 U. S. 410, 415, 26 L. ed. 797, 799;
Harrison v. German-American F. Ins. Co., 90 Fed. 762;
Schofield v. Horse Springs Cattle Co., 65 Fed. 433.

In United States v. McCarthy, 18 Fed. 68, the defendant was convicted of assault with intent to kill and sentence was imposed on March 1st, 1882. On the 3rd of June, 1882, during the same term, the judgment of March 1st was set aside and defendant was sentenced, and the court said: "There can be no doubt that the court has ample authority to set aside its judgments at the term at which they were rendered."

The case of United States v. Bradford et al, 131 Fed. Rep. 378, is very much in point. Hazel, District Judge, in granting a motion for new trial, said:

"It is quite probable that the trial might have terminated differently, had the jury not been influenced by the untruthful testimony to which reference has been made. The responsibility of granting a new trial in a criminal case is a grave one, and I have not arrived at the conclusion herein expressed without misgivings. In courts of the United States a motion for a new trial is addressed to the sound discretion of the court, and where it appears to the court in a criminal case that harmful results are probable, by reason of the mistaken testimony of a truthful witness, the ends of justice are doubtless best promoted by allowing a new trial. It is undoubtedly true that this application should have been made earlier. It was within defendant's power to move for a new trial on the same affidavits now before the court, very soon after the trial. His neglect to do so, however, in view of the peculiar circumstances of the case, ought not to deprive him of the right to another trial, where it appears as here, that important material evidence was received upon the trial, which is now shown to have been untruthful, and which facts have perjudiced the defendant's rights."

As said, in Harrison v. German-American Fire Ins. Co., 90 Fed. 758, text 762: "The practice obtaining in some of the other districts obtains here, of entering no order of *sine die* adjournment at the close of the actual sitting of the court for a stated time. The court is left open, so that further sitting may be taken up as a part of that term at any time when the business of the division requires it. When the date has arrived, under the statute fixing the terms, for the commencement of a term, the clerk enters the *sine die* adjournment of the last term."

A court once legally convened continues until actual adjournment.

Parsons v. Hathaway, 40 Me. 132.

A term of the United States Circuit Court does not necessarily end on the courts convening in another place in the same district. East Tenn. Iron & Coal Co. v. Wiggins, 68 Fed. 446. In that case it was contended that a bill of exceptions was signed after the term of the court had closed, because when the Chattanooga term began the Knoxville term was necessarily at an end. This case was heard before Taft and Lurton, circuit judges.

In Bronson v. Schulten, 14 Otto. 410, 26 L. ed. 797, this court said: "In this Country, all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and, if there be exceptions in the State courts, they are unimportant. It is the general rule of law that all the judgments, decisions or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the terms at which they are rendered or entered of record, and may then be set aside, vacated, modified or annulled by that court."

Chief Justice Field, in Duff v. Fisher, 15 Cal. 375, observed: "It may be, and probably is, true that the court, whether sitting in equity or on trial of a common law action, may, of its own motion, set aside the verdict of a jury when it is clearly and palpably against the evidence; but when the court is satisfied with the verdict the *parties* can only question the correctness by following the course pointed out by the statute."

In State v. Adams, 84 Mo. 315, the court held that the statute prescribing the time within which a party may file a motion to set aside a verdict does not confer upon the court any power which did not previously exist, or abridge any recognized powers of the court; but simply regulated the privilege of the *parties* to the suit. See also the note to DeVall v. DeVall in Ann. Cas. 1914 A, page 412.

Even though the motion was made more than four days after the rendition of the verdict and was required by the rule to be made within four days, yet the court may treat the motion for a new trial, filed out of time, as a suggestion invoking the exercise of judicial discretion.

In Scott v. Joffee (Mo.) reported in 102 S. W. 1039, the court said: "To say that the trial court is without power to vacate a judgment during the term at which it was rendered, because the motion for a new trial has been overruled, and the losing party, on account of the lapse of the statutory period of four days, is devoid of the right to move again for a new trial, would be to say that the court has no jurisdiction over the subject, and it is utterly powerless to remedy an injustice of the existence of which he has become satisfied. It is enough to say that the jurisdiction which the court retains over a cause during the terms at which judgment has

been entered is complete except so far as it has been curtailed by statute. And the court may, of its own motion, vacate the judgment either with or without the suggestion of the defendant party, and may treat a motion for a new trial *filed out of time* as a suggestion invoking the exercise of judicial discretion."

In Emma Silver Min. Co. v. Park, 8 Fed. Cas. 4,467, 14 Blatchford 411, it is held: "The right to control their own process and judgments, so as to promote justice, has always been recognized as one of the inherent powers of every court of general jurisdiction in the absence of any statutory limitation or prescription, and the practice of granting new trials took its origin from this authority. It is a mistake to suppose that such motion could only be entertained at the time when the action is tried. According to the great common law pratcice, although the motion is usually made pending the four days of the rule nisi, it is also entertained for good cause after the expiration of the four days, and so forth."

In Rex v. Teal, 11 East 307, upon application to make a motion for a new trial, the court said that the four days being now expired, he is not entitled to make such a motion, though *they* would hear any arguments which he had to suggest upon the report in order to satisfy them in the performance of their own duty, that justice had not been done upon the trial, and considering the learned judge's report, that there ought to be a new trial, they would, of their own accord, award it, and they referred to The King v. Holt, 5 Term Rep. 436, and to The King v. Atkinson, there cited.

And, in the same term, Lord Ellenborough, Chief Justice, said that the court had considered the objection which had been made to the trial, and though not in the form of a motion for a new trial, yet with the same benefit to the parties concerned.

See also Reg v. Newman, 3 C. & K. 252;
Dears C. C. 88, 1 E. & B. 268, 17 Jur. 617, 22 L. J. Q. B., 156, 72 E. C. L. 268;
Reg. v. Hetherington, 5 Jur. 529.

This court has settled this question in ex parte Lange, 18 Wall. 192, by saying that every term continues until the call of the next succeeding term, unless previously adjourned *sine die,* and, until that time, the judgment may be modified or stricken out.

See also ex parte Friday, 43 Fed. 916.

In United States v. Henry Pitman, 147 U. S. 669, 37 Fed. 324, the court said: "After the term of court has been regularly opened upon the day provided by law, the question how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall be open for incidental business after the regular business of the court

has been concluded, is a matter which rests in the discretion of the presiding judge."

In Lewis v. Wilson, 151 U. S. 551, 36 L. ed. 267, the court said: "It is unnecessary to express any opinion as to the right of a party to file a motion for a new trial more than four days after the verdict; nor to decide whether the court can or cannot—in the absence of any motion, of its own volition—whenever it sees that a grievous wrong has been done by a verdict, set it aside."

But, it is further contended by the Government that the order granting the motion for a new trial was made by Judge Locke in chambers at Jacksonville, Florida, and that Tampa was at that time in the middle, Jacksonville Northern Division of the Southern District of Florida, p. 10 of transcript.

The State of Florida is divided into two districts, to be known as the Northern and Southern Districts of Florida. Terms of the District Court for the Southern District shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and February; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. Section 76, Chapter 5 of the Judicial Code of the United States.

"In each of the districts described in Chapter 5 there shall be a court called the district court, for which there shall be appointed one judge to be called district judge."

The Southern District of Florida is not divided, by statute, into divisions. The jurisdiction of the district judge extends to all parts of the Southern District of Florida. He may, during the term of court held at Tampa, preside over the trial of a criminal case at which the defendant would be convicted; and, during that term of court, go to Jacksonville, and there act upon a motion for a new trial made by the defendant convicted by the court sitting at Tampa.

The division of the Southern District of Florida into the Northern, Middle and Southern Division, as declared by the rule of court, is for the purpose of practice in issuing, serving and returning process.

The court will observe that Judge Locke stated, in his order granting the motion for a new trial, that if the matters contained in the additional affidavits were presented to a petit jury it might raise reason for doubt in the minds of the jury as to the guilt of the defendant; and, certainly, if Judge Locke had the power and jurisdiction to grant this motion for a new trial, the sentence was set aside, and, if the case went no farther, the commitment to enforce this sentence would be illegal, and the defendant would be held without authority of law.

The court will find, however, that not only was the sentence set

aside and the defendant granted a new trial, but he was afterwards put upon trial and acquitted by a jury, during the term of the United States Court, and for these reasons the court below erred in his order of May 19th, 1915, remanding appellant, and said order should be here reversed, annulled and held for naught, as herein prayed.

II.

But, even if the court shall find that Judge Locke had no power to act upon and grant a motion for a new trial, and, if it be conceded that the order made by Judge Locke granting the motion for a new trial was without authority of law, null and of no effect, whatsoever, still, the record shows, clearly and without contradiction, that the Government acquiesced in the supposed illegal action of Judge Locke in granting the motion for a new trial, and thereafter, upon the motion of the United States District Attorney, the defendant, Abbott, was placed upon trial in the United States Court for the Southern District of Florida, on February 26th, 1913, and this resulted in a mistrial; and thereafter the same case was brought to trial again in the said court on the 12th day of March, 1914, and the jury duly empaneled and sworn to try the issues therein, and the said jury returned a verdict of not guilty, and thereupon, the said defendant, Abbott, was by the said court discharged from said prosecution, and was allowed to depart said court without day and discharged from said court without day, and since the acquittal and discharge of the defendant, he continuously resided in the City of Tampa, County of Hillsborough, State of Florida, within the jurisdiction of said court, and has not been, and is not now, a fugitive from justice, and during the entire time since the sentence was pronounced upon appellant, on the 12th day of March, 1912, no mittimus or commitment was ever issued out of or by said court to execute the said sentence until the 20th day of March, 1915.

I earnestly and respectfully submit to this court that, even if the action of Judge Locke in granting the defendant a new trial was illegal, null and void, yet, when the court afterwards put Abbott upon trial, and he was acquitted and discharged and allowed to depart the court without day and was not a fugitive from justice, and no effort was made to execute the said sentence of March 12th, 1912, and no mittimus or commitment was issued until the 20th day of March, 1915, after a lapse of more than three years, the court lost jurisdiction of the case against Abbott, and had no power or authority to issue the mittimus to execute the sentence, certainly not after the time named for his imprisonment had elapsed.

In Tuttle v. Lang, Me., 60 Atl. 892, the court said: "If, after conviction and sentence, any court, whether of general or limited jurisdiction, permits the convict to go at large without day, it can never thereafter

issue a mittimus for his commitment. In such case, having completed its judicial functions, it has voluntarily surrendered all control over the case and person." See authorities therein cited.

In re Richard Flint, 25 Utah 328, 95 Am. St. Rep. 853, the court said: "When the court suspended judgment indefinitely and ordered the defendant discharged from custody, it no longer had jurisdiction over him, and all subsequent proceedings in the premises were unauthorized by law and are therefore void," citing:

In re Strickler, 51 Kan. 700, 33 Pac. 620;
Peo. v. Kennedy, 58 Mich. 372, 25 N. W. 318;
United States v. Wilson, (C. C.) 40 Fed. 748;
Peo. v. Allen, 155 Ill. 61, 39 N. E. 568;
Weaver v. People, 33 Mich., 296;
Peo. v. Morrisette, 20 How. Pr. 118.

The action of the trial court in granting appellant a new trial, a subsequent acquittal and discharge by the court was an indefinite suspension of the execution of the sentence, and the court lost jurisdiction of the defendant and cannot, after the lapse of three years, and at a subsequent term of court, legally issue a mittimus to execute that sentence.

In Grundel et al v. People, 33 Colo. 191, 70 Pac. 1022, the court said: "In the absence of a permissive statute, the indefinite postponement of sentence upon one convicted of crime deprives the court of jurisdiction. Such postponement is in effect a discharge of the prisoner, and therefore ousts the court of the jurisdiction, after the expiration of the term, of further authority over him.

In Commonwealth v. Maloney, 145 Mass. 205, 13 N. E. 482, the defendant pleaded guilty on June 26th and the case was continued to August 7th, when the defendant was discharged. The court held that the discharged extinguished the authority to hold him under any then existing process, and said:

"This must necessarily have been the affect, unless his going at large is an escape on account of which he could have been retaken. But a going at large, under order of court cannot be an escape, even though the order be irregular and unauthorized."

In State v. Hilton, 151 N. C. 687, 65 S. E. 1011, the court held that when sentence was suspended and defendant performed all conditions and was discharged by a court, and the case removed from the docket, this amounted to a discontinuance, and the court was without power to proceed thereafter against the defendant.

For other cases on this point see:

Peo. v. Allen, 155 Ill. 61;
Peo. v. Barrett, 202 Ill. 207;
U. S. v. Wilson, (C. C.) 46 Fed. 748;
In re Peterson, 19 Idaho 433;

Ex parte Clendenning, 22 Okla. 108;
State v. Sturgis, 100 Me. 96;
In re Webb, 89 Wis. 364.
Corporate authorities of Scottsborough v. Johnson, 121 Ala. 397, 25 So. 809.

In United States v. Wilson, 46 Fed. 748, the court said: "Courts have no power to suspend sentence except for short periods pending the determination of other motions or considerations arising in the cause after the verdict.

"When the court has by order indefinitely suspended sentence, it cannot thereafter, and especially at a subsequent term, revoke such order and proceed to judgment by sentencing the defendant."

There are some cases holding that a court may suspend sentence, and that a sentence is only executed by actual suffering of the penalty imposed. But even those cases would not rule this one. The instant case is more than one of suspension of sentence. There has been a loss of jurisdiction here—a discontinuance.

A discontinuance is defined to be a casm in the proceeding after the suit is pending. Exp. Hall, 47 Ala. 680; McAlpine v. State, 47 Ala. 79.

In Dunkard v. State, 20 Ala. 13, it is held, when the cause is taken from the docket by the solicitor, with the permission of the court, and no process is issued thereon for more than two years, it must be discontinued by failing to prosecute it regularly.

A criminal, as well as a civil suit, may be discontinued. Drinkerd v. State, 20 Ala. 9; Ex parte Hall, 47 Ala. 680, Hawkins Pleas to the Crown, vol. 2, page 416, Chitty's Criminal Law, 364; especially see Ex parte Rivers, 40 Ala. 712.

The rights of a defendant in a civil case cannot be greater than those of a defendant in a criminal case. Nor can the State, in a prosecution by indictment, claim an exemption from the consequences of its own unlawful interference with the progress of the suit in any case where a plaintiff in a civil suit cannot claim like exemption. Suppose a plaintiff in a civil suit had actually done with his suit what the United States district attorney, by leave of the court, did with the instant case. Would it not have been a clear case of discontinuance and abandonment of the suit?

In Lewis v. Wilson, 151 U. S. 551, reported in 14 S. Ct. Rep. 419, a motion for a new trial was made after the four days, but the verdict was reduced by the court, with the consent of the parties, and the plaintiff afterwards moved for a judgment on the verdict as it stood before its reduction, because the motion for a new trial could not be made under the laws of Florida, after the expiration of four days from the date of

the verdict. The Supreme Court of the United States, speaking by that great and learned judge, Mr. Justice Brewer, said: "It is unnecessary to express any opinion as to the right of a party to file a motion for more than four days after the verdict, nor to decide whether the court can or cannot, in the absence of any motion, of its own volition, whenever it sees that a grievous wrong has been done by a verdict, set it aside, for there is nothing which prevents a party having a verdict from consenting to its reduction; and, if he does so, though only for the sake of obtaining immediate satisfaction of his claim, and to avoid further delay and further litigation, he may not, after the entry of judgment based thereon, the receipt of payment, and an acknowledgement of satisfaction, repudiate the whole transaction, and obtain a judgment for the full amount of the verdict, on the ground that, under the law, the court had no power to disturb the verdict."

So, in the instant case, the Government, by its district attorney, might have had the mittimus to issue at once, after Judge Locke granted the motion for a new trial; but when the defendant was thereafter placed upon trial by the court upon the active interference and motion of the district attorney, and was acquitted by a jury and the defendant discharged by the court without day, and the case taken from the docket, the case will be considered discontinued and abandoned.

Here was an active interference of the district attorney of the court, and not a mere neglect or omission of a ministerial officer.

As the plaintiff in Lewis v. Wilson was bound, so is the Government in United States v. Abbott bound. As the plaintiff, in Lewis v. Wilson, acquiesced in the ruling of the court on the motion for a new trial, so the Government, in United States v. Abbott, acquiesced in the ruling of the court on the motion for new trial. As the plaintiff, in Lewis v. Wilson, could not repudiate the whole transaction and obtain a judgment for the full amount of the verdict on the ground, that, under the law, the court had no power to disturb the verdict, so the Government, in the instant case, cannot repudiate the whole transaction, after the acquittal of the defendant on the ground that, under the law, the court had no power to disturb the verdict.

The instant case must be disposed of and the judgment reversed, under the decisions of this court enunciated in Harlan v. McGouran, *Supra,* and Lewis v. Wilson, *Supra.*

If, when Judge Locke granted the defendant's motion for a new trial, the United States district attorney had caused a mittimus to issue at once, he might have contended that the action of the judge was illegal, and if, on habeas corpus, it were decided that the motion for a new trial had been granted after the adjournment of the court and was illegal, the court might enforce the sentence. But that is not the case here. After

setting the sentence aside, the court, upon motion of the district attorney, put the defendant on trial twice, then he was acquitted, and no steps were taken to enforce the sentence for three years thereafter, long after the time of sentence had expired, and two or three terms of court had come and gone.

There must be a time when the court's jurisdiction over the defendant's person by way of punishment ceases.

The return or answer to the writ alleges that the defendant was responsible fo rthe long delay in the execution of the sentence, and that he procured the motion for a new trial on false affidavits. This is mere argument, and a poor argument at that.

The defendant only delayed the case from March 12th to June 24th. He cannot be blamed for the exercise of a right to move for a new trial—a right recognized by an honorable judge who graced the bench for forty years. The court and district attorney are to be blamed for all the delay from June 24th, 1912, to March 20th, 1915, when the mittimus was issued.

Judge Locke said, in his order granting the motion for a new trial, "that if the matters therein contained were presented to a petit jury it might raise a reasonable doubt in the minds of the jury as to the guilt of the defendant."

And, sure enough, a petit jury finally found the defendant not guilty.

The mittimus issued in this case is the ordinary mittimus usually issuing to execute a sentence. It will be found on page 1 of the record. It commands the marshal to deliver the body of the said James J. Abbott to the warden of the United States Penitentiary at Atlanta, and commands the warden to receive the said Abbott and him safely to imprison by confinement, and so forth. It does not authorize the arrest of Abbott, who was at large.

In Tuttle v. Lang, Sheriff, —— Me ——, 60 Atl. 892, the Supreme Court of Maine says:

"The ordinary mittimus directs the officer to commit the convict then in custody to the jail or prison, according to the sentence. It contains no order to arrest and does not authorize an arrest of one at large, and not an escaped prisoner."

The arrest of appellant, while he was at large and not an escaped prisoner, under a mittimus that directs the marshal to deliver the body of the prisoner to the warden of the Penitentiary and contains no order to arrest, does not authorize an arrest of one at large and not an escaped prisoner.

The order of May 19th, 1915, remanding the defendant, should be reversed.

CHARLES B. PARKHILL,
Attorney for Appellant.

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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

JAMES J. ABBOTT, APPELLANT,
v.
JAMES C. BROWN, UNITED STATES MARshal in and for the Southern District of Florida. } No. 611.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE APPELLEE.

STATEMENT.

This appeal invites review of an order made on May 19, 1915, by the District Court for the Southern District of Florida, discharging a writ of habeas corpus. The petition and return disclose (R. 1–3, 5, 6–9) the following undisputed facts.

During the term of that court held at Tampa, in February and March, 1912, Abbott was convicted under section 195 of the Penal Code (denouncing embezzlement of mail matter while in the postal

service). On March 11, 1912, he filed a motion for a new trial. On March 12 this motion was denied, and he was sentenced to eighteen months' imprisonment at Atlanta. He is being detained by the United States Marshal pursuant to a commitment issued upon that sentence on March 20, 1915.

On March 12, 1912, and after the sentence, the court adjourned for the term, subject to its Rule 1, which provides for the entry of orders relating to business that may be transacted by the clerk under orders of the judge. Having failed to seasonably prepare his bill of exceptions Abbott, on May 24, 1912, filed a second motion for new trial based on the the sole ground of newly discovered evidence, but with new supporting affidavits; and on June 26, 1912, after the expiration of time allowed in the "term-time" order for perfecting his appeal (R. 10), and while in a different division of the district, the judge vacated the order of March 12, 1912, denying, and made a new order granting, a new trial, and admitting to bail.

A retrial in February, 1913, resulted in a mistrial; but on a second retrial in March, 1914, the jury returned a verdict of not guilty.

In February, 1915, the affiants upon the second motion for new trial were indicted for perjury, and Abbott himself was indicted for suborning them. He demurred to and moved to quash the latter indictment on the ground that, because his second motion for new trial and the supporting affidavits were

filed more than four days after the original verdict, and also after the final adjournment of the term, that proceeding was *coram non judice*, beyond the power of the judge or court, and, therefore, void and a nullity. The court sustained this contention; quashed the indictment for subornation; and discharged him.

The Government, acquiescing in this result so secured by Abbott, then procured a commitment upon the original judgment of conviction and caused him to be taken into custody thereunder; whereupon Abbott brought this habeas corpus proceeding in which he contends that he is unlawfully detained because, having been granted a new trial, he was acquitted of the crime covered by this commitment. The court below ruled against him. Two questions arise here: (1) Was the order for a new trial and the trial proceedings thereunder a nullity? (2) If not, should they, nevertheless, be so regarded as against Abbott after he had sought and obtained a judgment of their nullity—thereby securing immunity from the charge of subornation and depriving the Government of its right to have him punished therefor?

ARGUMENT.

I.

THE DISTRICT COURT WAS WITHOUT POWER TO ENTERTAIN THE SECOND MOTION FOR A NEW TRIAL. ITS ORDER THEREFORE AND THE SECOND RETRIAL AND APPARENT ACQUITTAL WERE EACH AND ALL MERE NULLITIES.

(*a*) This was the contention of Abbott in the subornation case. As that contention was not a collateral attack against the original cause, neither is the same contention when here made by the Government—this because the so-called new trial proceedings were void *in toto*. Here, too, the Government has challenged their validity in the *main case* by procuring a commitment upon the original sentence.

(*b*) Conceding that a United States district court has power to grant a new trial in a criminal case, at any time during the term at which the verdict was rendered and sentence imposed, *Ex parte Lange*, 18 Wall. 204, nevertheless rule No. 20 of that court provided:

> Motions for new trials shall be made *within four days* after the entry of the verdict, during which time no judgment shall be entered, except by leave of court, etc.

In *Kingman* v. *Western Mnfg. Co.*, 170 U. S. 678, this court said:

> The motion for a new trial in this case was filed within 3 days after the return of the verdict * * *. No leave to file it was required, and as it was entertained by the court,

> argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made.

In the case at bar, if the clause as to court leave modified the preceding clause as to entry of judgment, then the first motion only was in conformity to this rule; while if it modified the four-day clause, then leave was required to file the second motion. None was asked for or granted nor does that motion seem to have been appeared to or argued for the government; and in both these respects it was in opposition to the rule.

But it may be said that such a breach of rule does not necessarily involve an extra judicial act. And as we are here concerned only with the court's power rather than the regularity of its exercise, we pass to features which unquestionably involve lack of power.

(*c*) Each, the original and the second motion for a new trial, was based *solely* on "alleged newly discovered evidence" (R. 7). Unless rule 1 of the district court and the statute under which it was promulgated operated to keep the term open after March 12 and until May 25, 1912—a matter which will be later considered—the case on this point is also controlled by the decision of this court in *United States* v. *Mayer*, 235 U. S. 55, 67, in which case this court said:

> In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at

> which it was entered, unless the proceeding for that purpose was begun during that term. (67)

After enumerating certain exceptions not here material, the court continued:

> In cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and *newly discovered evidence*, as well as where it is sought to have the court in which the case was tried reconsider its rulings, the remedy is by a motion for a new trial (Jud. Code, Sec. 269)—an application which is addressed to the sound discretion of the trial court, and, in accordance with the established principles which have been repeatedly set forth in the decisions of this court above cited, *cannot be* entertained, in the absence of a different statutory rule, *after the expiration of the term at which the judgment was entered.* (69) (Italics ours.)
>
> In a Federal court of competent jurisdiction, final judgment of conviction had been entered and sentence had been imposed. The judgment was subject to review in the appellate court, but so far as the trial court was concerned it was a finality; the subsequent proceeding was, in effect, a new proceeding which by reason of its character invoked an authority not possessed. (70)

The return (R. 8) does not admit the averment of the petition (R. 3) that the United States Attorney moved for trial setting on the first retrial (the mistrial). But conceding that he did and that he, for the Government, participated therein, and in the

second retrial, this in no wise affects the question. As this court said in the *Mayer* case, *supra:*

> In these circumstances it would seem to be clear that the consent of the prosecuting officer could not alter the case; he was not a dispensing power to give or withhold jurisdiction. The established rule embodies the policy of the law that litigation be finally terminated, and when the matter is thus placed beyond the discretion of the court it is not confided to the discretion of the prosecutor. (70)

There remains under this point but the effect of the statute designating terms of that court and its rule No. 1-A. The statute, section 76, Judicial Code, so far as material, provides:

> *Terms* of the district court for the southern district shall be held * * * at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April, and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times *for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction.* (36 Stat. 1108.)

The rule, No. 1–A, reads:

> *The law requiring* the *court to be* always *open* for the transaction of *certain* kinds of *business which may be transacted under the statutes,* and *under* the orders of the judge who may at the time be absent from the place

> in which the court is held, and which business can be transacted by the clerk under the orders of the judge, and is transacted from day to day in the court, it is *ordered* that, *pending* the temporary *absence* of the presiding *judge* of this district *from the district*, or the *division of the district in which business is presented* to be transacted, the clerk be present, either by himself of (or) his deputy, daily, for the transaction of business, and *upon such days* as *there is business to be transacted, the court be opened*, and that a record of the same be entered upon each of said days upon the minutes. (R. 2.)

The adjournment order of March 12 reads:

> Ordered that court be adjourned in accordance with general rule No. 1, and all orders and other matters be entered as by the term.
>
> Thereupon court is adjourned as ordered. (R. 2.)

The new trial order of June 26 (R. 2) was made by Judge Locke at Jacksonville and transmitted to, and entered by, the clerk at Tampa, he having from day to day after March 12 noted in the minutes that the "court was open in accordance with general rule No. 1."

The February term could only have endured until May 26 and June 27, 1912, in one of three ways: (1) Because the court had never made an adjournment order, or (2) because the statute kept it open, or (3) because Rule 1–A did so.

(1) The order of February 12, *supra*, was clearly an order of final adjournment subject only to the operation of rule 1. (2) The statute, §76, *supra*, by its very terms kept the court open for admiralty and maritime jurisdiction *only*. (3) Under the rule the court was "to be opened" *only* on such days as "thereis business to be transacted," and the business referred to is that described in the preamble, viz, for the transaction of which "*the law*" required "the court to be always open." The statute only required this for "admiralty and maritime jurisdiction" and the common law did not require it for any kind of criminal procedure. For this reason also this case was not within the benefit of rule 1.

True the rule recited that such "open court" business might be transacted under statutes and under orders of an absent judge; but the "judge order" business was limited to such as the *law* required the court to be open for—i. e., admiralty or maritime; and such recital would not and was not meant to enlarge the power of the court or judge beyond that bestowed by statute or common law before the rule was promulgated.

The case of *Harlan* v. *McGourin*, 218 U. S. 450, is easily distinguished from the case at bar, both by reason of the rule and lack of a *court* adjournment order. The record in that case shows that prior to and during part of the March term, 1906, of the circuit court at Pensacola, an order was in force, issued July 29, 1904, which, after stating that business of a

general character is transacted from day to day in the court, expressly provided that, pending the temporary absence of the presiding judge of the district, the circuit court should be open daily both at Pensacola and Tallahassee. During the March term (May 18, 1906) a new code of rules was adopted, of which the following is the thirteenth:

> During the temporary absence of the judge the court shall be deemed open daily at each of the clerk's offices in the district, for the transaction of business on the equity side of the court, and also for the filing of papers and the transaction of business of a general character in court, and the clerk shall be present, in person or by deputy, and a record of the same shall be entered upon the minutes of the court upon each day.

This rule expressly kept the court open "for the transaction of *business* of a *general* character in court" and during absence of the judge—*not from the district,* but merely from the place where the term was open, and the prior order was to the same effect. There was no formal order of general adjournment. The court simply left on a certain day with the usual daily adjournment and thereafter the clerk "rubber-stamped" the adjournment from day to day. Such was the situation when the judge returned and the court took the action that was challenged. Clearly the daily adjournments were subject to the rule; and the broad language of the latter kept the term alive for *all purposes* until the judge returned.

Here, on the contrary, before leaving, the court itself brought the term to an end by the general adjournment order of March 12, with only such qualification as rule 1 demanded as to a *particular kind of business* for which the law required the court to be kept open. Indeed, by the terms of the rule the court was "to be opened" on specific days and for specific business only; thus showing that for all other business on those days, and on all other days, it was to *remain closed;* and that necessarily it had been *closed* by the general order of March 12, *supra.*

Judge Sheppard later in the subornation case so interpreted the statute, rule 1, and the court order of March 12, *supra;* holding, as we believe correctly, that the so-called order of June 26, granting the retrial, was *coram non judice* and that all subsequent proceedings had as a result thereof were nullities.

II.

THE APPELLANT IS ESTOPPED TO ASSERT THAT THERE WAS NOT A FINAL ADJOURNMENT OF THE COURT, AND THAT THE MOTION FOR A NEW TRIAL WAS NOT MADE AFTER SUCH FINAL ADJOURNMENT.

(*a*) Both parties agree that the original judgment of imprisonment against Abbott, upon which the commitment issued, was valid. They differ as to whether that judgment was ever legally set aside, Abbott *now* claiming that it was. In the subornation perjury proceedings, however, he claimed that it was not, inducing the court to take that view, and to discharge those proceedings; and he accepted the

benefit of that ruling. He, therefore, seeks to occupy, and to get the important benefit of, two directly contrary positions, solemnly assumed by him in judicial proceedings necessarily involving the present validity of the original judgment.

(*b*) Can an estoppel be asserted in a criminal proceeding? In 2 Coke's Institutes, Vol. I, p. 39, it is said:

> The King, though he be not party to the record, yet shall he take advantage of the estoppel, for he is ever present in court.

While Lord Coke is speaking of the writ in *capite*, which particularly interested the King, his principle seems to be that an estoppel, for reasons of public policy, would have a larger operation in the case of the Crown than in the case of a private individual. The following state cases have held that an estoppel may be raised in criminal cases: *People* v. *Royce*, 106 Cal. 173, 187; *State* v. *Spaulding*, 24 Kans. 1, 9 (opinion by Judge Brewer, afterwards of this court); *State* v. *O'Brien*, 94 Tenn. 79; *State* v. *District Court*, 78 Pac. 769 (Mont.). *Contra: Moore* v. *State*, 53 Nebr. 831; *Bailey* v. *State*, 57 Nebr. 706, 710. The former held that a defendant could be brought by estoppel within a class covered by a criminal statute; the latter denied it. We are not concerned with the correctness of these decisions, for here we need only insist that a defendant can not claim in one action that certain proceedings in a criminal case were void, and later, in another action, that they were valid. It is well settled that there can be an estoppel

in one criminal case by the record of a former criminal case. *Commonwealth* v. *Evans*, 101 Mass. 25. If a man on trial for murder can have an essential defense taken away from him by the record in a former case, it is difficult to see why, in the present case, the defense that the original judgment was validly set aside may not be taken away from Abbott by estoppel of the record in the subornation case in which he successfully maintained that it was still in force. If an estoppel would arise against Abbott under the circumstances of the present case if his adversary were an individual, *a fortiori* should it arise against him when his adversary is the whole people of the United States and the estoppel is in aid of the fair enforcement of public justice.

(c) The principle here invoked really rests on a higher plane than that of estoppel. It rests on the idea that he may not play fast and loose with Courts, nor escape punishment, by claiming in the one Court that proceedings *taken by him* to set aside a judgment were void, and then, when steps are taken to execute the judgment, that those proceedings were valid. The strongest demands of public policy prohibit such a course. In Bigelow on Estoppel, 6th Ed., pp. 783, 785, it is said:

> If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at

> naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them. * * * If a party accept the benefit of a judgment, some authorities hold that he will be estopped to appeal from it, to dispute the court's jurisdiction, or otherwise to deny its validity and force. On the other hand, if a party decline to accept a judgment or decree in his favor and seek another, he will not be permitted to claim the first, on the second one turning out less favorable to him.'

In *Davis* v. *Wakelee*, 156 U. S. 680, a bill was filed in the Southern District of New York to enjoin defendant from setting up as a defense to an action at law which plaintiff intended to bring against him on a judgment recovered in California, that such judgment was void. Defendant, having been adjudicated a bankrupt in California (where certain of his notes held by plaintiff's predecessor had been proved), removed to New York. Later this judgment was rendered against him in California on these notes, without personal service—such a judgment being considered valid by the courts of California. Subsequently defendant applied for discharge in bankruptcy, and plaintiff's predecessor objected. Defendant moved to dismiss the objection on the ground that the debt was merged in a valid judgment, *which*, because rendered after the adjudication of bankruptcy, would not be affected by the

discharge. The court took this view, and dismissed the objection; whereupon the present proceeding was brought. The court below rendered a decree enjoining the defendant from asserting that *the judgment was invalid, and did not still stand of record.* This judgment was affirmed, the court saying (p. 691):

> It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it. He obtained an order which he could only have obtained upon the theory that the judgment was valid—his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position.

This quotation may be changed to suit the circumstances of the case at bar as follows:

> "It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself" (asserting that it had never been lawfully set aside or reversed), "and in a subse-

> quent proceeding upon such judgment, claimed" (that it had been lawfully set aside or reversed).

It is submitted that no change has been made in the latter quotation which takes it out of the law as laid down in the former.

In *Davis* v. *Wakelee, supra,* page 691, the case of *Abbot* v. *Wilbur,* 22 La. Ann. 368, is referred to as "directly in point." Abbot had sued Barge, who filed a counterclaim. Subsequently Barge brought a direct suit against Abbot on this counterclaim and recovered judgment by default. When the original action came on for trial, Abbot objected to the counterclaim that it was in judgment, and the court, sustaining this objection, dismissed the counterclaim. Abbot then filed the action before the court, asking to have the default judgment set aside, on the ground that it had been obtained without service. The Supreme Court of Louisiana held he was estopped to assert that the judgment was not valid, and said:

> The estoppel does not supply the want of citation; it prevents the plaintiffs from showing that such a want exists. (P. 370.)

Assume a judgment rendered against Abbot after due service had been later set aside and another judgment rendered; that Abbot in the Barge suit had insisted that the proceedings setting it aside were invalid, and that the original judgment was still in force; that he had gotten the court to so hold, and had accepted the benefit of this holding;

would not the decision have been the same? This last assumption is the actual case at bar.

In *Davis* v. *Cornwall*, 68 Fed. 522, another branch of the litigation passed on in *Davis* v. *Wakelee* was before the Circuit Court of Appeals for the Second Circuit. In the *Cornwall* case, however, the action was in the nature of *scire facias* on the California judgment (just as in the case at bar the commitment under which Abbott is held was issued on the original judgment). The court held that *Davis* v. *Wakelee* was controlling, and said (p. 525):

> The appellant attempts to parry the force of the decision by urging that the case then before the court differed from the present case, inasmuch as the estoppel was based upon the defendant's false assertion of fact in the bankruptcy proceeding that the judgment was in full force. The court, however, did not consider the case upon the rules applicable to the common estoppel which springs from the misrepresentation of fact, but puts its conclusions upon the salutary doctrine of estoppel, which prohibits parties from playing fast and loose with courts of justice. Indeed, all the statements in the petition which was the basis of the order in the bankruptcy proceedings were matters of legal conclusion; and the court was of the opinion that although the defendant, in making them, was under a mistaken view of the law, that circumstance could not shield him from the effect of an estoppel. The plaintiff, as well as the defendant, was bound to know the law, and, by

> conclusive presumption, could not have been misled by the defendant's statement that the judgment was in full force, when in fact it was a nullity, because of want of jurisdiction of the court which rendered it. He was prejudiced, not by any false statement of the defendant, but by the conduct of the defendant in procuring a disposition of his legal rights by a judicial tribunal to his disadvantage, and for the benefit of the defendant; and if he chose to acquiesce the defendant ought not to be permitted now, with the fruits of his conduct in his hands, to assert that what he then maintained was a delusion, and that the disposition made was wrong.

In *Michels* v. *Olmstead*, 157 U. S. 198, it was held that the defendant, having successfully excluded certain testimony as incompetent in an action at law, was estopped to assert in an equity proceeding that the evidence was competent at law only. The court said:

> * * * he is thereby estopped now to assert that it could or should be availed of at law. * * * If the evidence was inadmissible at law, which he is estopped to deny * * *. (p. 201).

As a party may be estopped, by reason of inconsistent attitudes adopted by him in different litigations, to assert a legal rule of evidence, so, here, Abbott may be estopped to assert his *present construction* of the *order* of *adjournment* and of *Court rule No. 1*, because of *his contrary construction* in the *subornation proceedings*.

In *Hughes* v. *Dundee, etc., Co.*, 28 Fed. 40, 46, it was held by Judge Deady that where a defendant had sued out a writ of error to a judgment against himself, he could not plead the same judgment as a defense in another action. The court said:

> It is clear, both on reason and authority, that, if the judgment had been in its favor, it could not maintain a writ of error to reverse it and also an execution to enforce it.

So here, if the original judgment against Abbott had been one of fine only, he could not claim that it had been legally set aside, and also that he could satisfy it by payment of the fine because it never had been legally set aside.

In *The New York*, 113 Fed. 810, the Circuit Court of Appeals for the Second Circuit held that, by giving a delivery bond in one libel action, the claimant was estopped to assert that a decree for sale and actual sale made in another libel action had not been validly set aside. In *Long* v. *Lockman*, 135 Fed. 197, it was held that a bankrupt was estopped to assert that his "residence" was not in Colorado (where evidently it was not), because he had successfully defeated bankruptcy proceedings in Arkansas by alleging that his "residence" was in Colorado. The court said: "I * * * hold that this court has jurisdiction upon the grounds of estoppel" (p. 199). As "residence" is a mixed question of law and fact, the case is an authority that this kind of estoppel extends to questions of law, *e. g.*, whether a motion was made in term time or not. In *Nixon* v. *Fidelity, etc., Co.*, 150 Fed. 574, 576, the

Circuit Court of Appeals for the Ninth Circuit held that a person who had accepted the fruits of a judgment was estopped in another proceeding to assert that the court had no power to render it.

The following cases in the State courts are to the same effect:

Smith v. *Warden*, 7 Harris (Pa.) 424, 429, 430; *Taylor* v. *Crook*, 136 Ala. 354, 378; *Bank* v. *Fritzlen*, 75 Kans. 479, 490; *Test* v. *Larsh*, 76 Ind. 452, 460; *Harbaugh* v. *Albertson*, 102 Ind. 69, 75; *Kile* v. *Town of Yellowhead*, 80 Ill. 208, 211; *D. C. I. & W. Co.* v. *Middaugh*, 12 Col. 434, 436, 437; *Arthur* v. *Israel*, 15 Col. 147, 153, 154; *Ellis* v. *White*, 61 Iowa 644, 646. (See also *De Metton* v. *De Mello*, 12 East. 234.)

In *Arthur* v. *Israel*, *ubi supra*, the petitioner claimed in administration proceedings that she was the wife of Arthur. It appeared that Arthur had obtained a divorce on the ground of desertion; but the Supreme Court held the decree void for lack of service, and that petitioner was Arthur's widow. (7 Colo. 5.) See also *Cheely* v. *Clayton*, 110 U. S. 701. When the case came back, it was alleged that petitioner had deserted her husband (Arthur) and had lived in adultery with Israel; that after learning of the divorce decree she had married Israel. Under these circumstances the Supreme Court held that she was estopped to assert the invalidity of the divorce proceedings. The court said (pp. 153, 154):

> We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an

estoppel as if she had received the proceeds of a void judgment for money. By her subsequent marriage with Israel during Arthur's life-time, she accepted, so far as was within her power, the benefits or privileges of the divorce decrees. The fact that she did not then know that those decrees were void is a matter of no more consequence than is the ignorance in this respect of one who, knowingly in all other particulars, receives the fruits of an ordinary void judgment at law. That, at the time of her marriage with Israel, she understood the decrees to be valid, is, if true, only an additional earnest of her acquiescence in the result, and sincerity in accepting and taking advantage of the benefits supposed to follow. Besides, had she believed them void, her obliquity would be even deeper than it is; because to her other alleged offenses would be added that of intentional fraud upon Israel, who may have thought that he was contracting a valid marriage.

We are not unmindful of the fact that the analogy between accepting the fruits of void judgments at law and accepting the pecuniary benefits, if any there be, together with the privileges of void divorce decrees, is not perfect in all respects. But the importance and justice of recognizing an estoppel in the latter case may be far more weighty than in the former. The immediate parties are not alone concerned. The public is always, and other individuals are usually, profoundly interested. Public policy, as well as private interest, requires that, so far as may be consistent with

> fundamental principles of law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election and thus demonstrate the invalidity of his second marriage, together with the unconscious adultery of his second wife, and the illegitimacy of her children, if any she have by him.

Here we see estoppel affecting even status. So a party may be estopped to assert even the unconstitutionality of a statute, though such unconstitutionality has been judicially determined. *Daniels* v. *Tearney*, 102 U. S. 415, 419, 421. We do not mean to assert that jurisdiction can be conferred upon a court by estoppel, any more than by consent, as a general thing. That it can not be is decided by such cases as *Capron* v. *Van Noorden*, 2 Cranch, 126; *M. C. and L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 382; *Ayres* v. *Watson*, 113 U. S. 594, 598; *C. B. and Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419–421 (although these cases seem somewhat difficult to reconcile in every respect with *Ry. Co.* v. *Ramsey*, 22 Wall. 322, 327; *Cowley* v. *Northern Pac. R. R. Co.*, 159 U. S. 569, 583; *Tootle* v. *Coleman*, 107 Fed. 41, 45; unless it be on the ground suggested in *Mercelis* v. *Wilson*, 235 U. S. 579, 583). But the rule forbidding jurisdiction by estoppel is limited, in the application, to jurisdiction of the particular proceeding then before the court—*i. e.*, in this case, the present habeas corpus proceeding. What happened

between the parties in other phases of the litigation is in the present case not a matter of jurisdiction, but of *data* to be considered in determining whether the court had jurisdiction of the petition for habeas corpus and what decision it should justly render. When, in a case before this court, the proceedings in other courts are, *inter alia*, the elements of the case as here made or defended, the principle prohibiting inconsistent positions applies; and a party may be estopped to assert that such proceedings were as he claims, because he has previously asserted the contrary in other judicial proceedings.

(*d*) Abbott claims that though he is not, yet the United States is estopped, by reason of its active participation and acquiescence in the new trials, and the final acquittal. But the Government did nothing more than attempt honestly to meet Abbott's changes of position. When, at his insistence, a new trial was granted the United States met that issue, and when he was acquitted it acquiesced, on the assumption that Abbott also honestly acquiesced, without reservation. When, however, Abbott, in the subornation proceedings, entirely shifted his ground and successfully denied the validity of his motion for a new trial, there was nothing for the Government to do, if the proceedings were not to be turned into a farce, but to meet the new shift, and to insist upon the execution of the original judgment. The case of *Lewis* v. *Wilson*, 151 U. S. 551, relied upon by appellant, is therefore really against him and in line with the cases herein cited on behalf of the Government.

III.

ASSUMING THAT THE ORIGINAL JUDGMENT WAS NOT LEGALLY SET ASIDE, BUT IS STILL IN FORCE, NOTHING OCCURRED AFTER ITS RENDITION WHICH DEPRIVED THE COURT OF THE POWER TO EXECUTE IT.

The appellant argues that, owing to the new trials, in which the United States acquiesced, to the verdict of acquittal, and to the order of the court discharging the defendant, the court lost jurisdiction of the case, and had no power subsequently to issue an order of commitment on the original judgment, and especially not after the period of the original sentence had expired. In support of this view he cites, on pages 12, 13, and 14 of his brief, a number of State decisions.

In *Morgan* v. *Adams*, 226 Fed. 719, it appeared that Adams had, on February 10, 1913, been sentenced by the District Court for the Northern District of Ohio to imprisonment for five years, but that the sentence had been suspended during good behavior. On November 6, 1913, after the term at which sentence had been imposed, the suspension was vacated and commitment issued. On habeas corpus, the lower court held that the suspension order was void; that, therefore, the court had lost jurisdiction and could not issue the commitment. The Circuit Court of Appeals for the Eighth Circuit reversed the judgment, and held that, though the suspension order was void, the original sentence still stood, and could be executed. They referred to the State authorities on both sides of the question, including

a number of those cited by appellant here, and said (p. 721):

> * * * They have been deliberately considered, and it is sufficient to say that the conclusion forced upon our minds is that, if the order suspending such a sentence is illegal, it is so not because it is irregular or technically defective, but because it is beyond the power of the court, and it is therefore void, and the sentence stands, and is enforceable by the court *at any time after its rendition, either before or after the term of the court, until the convict has suffered the penalties it imposes.* * * * [Italics ours.]

In addition to the cases cited by the Court as sustaining its conclusion, we refer to *Dolan's Case*, 101 Mass. 219, 222; *State* v. *Cockerham*, 24 N. C. 204; *Re William Shaw*, 31 Minn. 44; *Ex parte Vance*, 90 Cal. 208, 210; *Miller* v. *Evans*, 115 Iowa, 101; *Ex parte Eldridge* (Okla.), 106 Pac. 980; *Henderson* v. *James*, 52 Ohio St. 242.

In regard to the authorities cited by appellant, some are cases where the court, having suspended *the imposition* of sentence, undertook after the term to pronounce sentence *for the first time.* Such are *People* v. *Barrett*, 202 Ill. 287; *People* v. *Weaver*, 33 Mich. 297; *Commonwealth* v. *Maloney*, 145 Mass. 205; *Grundel* v. *People*, 33 Col. 191; *State* v. *Hilton*, 151 N. C. 687; *re Flint*, 25 Utah 338. To hold that the court has no power to do this is evidently quite a different thing from holding that where a judgment has been rendered and is still in force, mere delay, or the interposition of void proceedings to set it aside

or displace it, make it *functus officio,* impossible of execution. The coexistence in Massachusetts of *Dolan's Case, supra,* and *Commonwealth* v. *Maloney, supra*; and in North Carolina of *State* v. *Cockerham, supra,* and *State* v. *Hilton, supra,* demonstrates this distinction. The case of *Ex parte Clendenning,* 22 Okla. 108, upon which most reliance is placed by those who deny the court's power to issue the commitment, was solely relied upon by petitioner in *Ex parte Eldridge, supra* (Okla., 1910), but the court held it inapplicable, and in a most vigorous opinion held that

> "where the penalty is imprisonment, the sentence may be satisfied only by the actual suffering of the imprisonment, unless remitted by death or some legal authority."

To hold otherwise would be manifestly incorrect. The sentence is imposed for the benefit of the public, which has a vital interest in its enforcement. It stands of record in favor of the public against the criminal, and, *ex hypothesi,* has not been vacated by other matters of record, or by equivalent facts such as death or pardon. How, then, can mere acts *in pais,* such as oversight, mistake, or laches, have the effect to satisfy it? And especially how can such acts have this effect in the case at bar, where as to everything done the defendant himself was the moving cause?

As for the argument that the prosecution was discontinued, it is sufficient to say that there is nothing in the case which in the least resembles a discontinuance.

CONCLUSION.

Abbott committed two crimes. By his shifting tactics he has thus far escaped all punitive consequences. It is respectfully submitted that he owes punishment, and that the judgment below should be affirmed.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

MARCH, 1916.

ABBOTT *v.* BROWN, UNITED STATES MARSHAL FOR SOUTHERN DISTRICT OF FLORIDA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 611. Argued April 13, 1916.—Decided June 12, 1916.

A rule of the District Court requiring motions for new trials to be made within [illegible] days after entry of the verdict is a mere regulation of practice, a breach of which is only an error of procedure, not affecting the jurisdiction of the court.

After reviewing the statutes relating to the terms of the District Courts of Florida and the provisions of the Judicial Code and the Rules of Court relating thereto and to the granting of new trials, *held*, that:

Such statutory provisions are designed to render the District

Courts readily accessible to applicants for justice in all branches of the jurisdiction; and, while they require those courts to be always open only as courts of admiralty and of equity, they permit special terms to be held at any time for the transaction of any kind of business.

General Rule No 1, of the District Court for the Southern District of Florida, providing for day to day adjournments during the absence of the presiding judge, should be liberally construed so as to keep the court open from the beginning of one statutory term to the beginning of the next, *Harlan* v. *McGourin*, 218 U. S. 442; and an adjournment made pursuant to that rule does not bring the term to an end, nor is an order for a new trial made after such an adjournment, and before the beginning of the next term, beyond the jurisdictional power of the judge.

One is not estopped from asserting that the judge making an order for a new trial had jurisdiction to make the same, because in another proceeding he had moved to quash an indictment for subornation of perjury, in connection with such new trial, on the ground that the judge acted beyond his jurisdiction in granting the motion, because not made within the time prescribed by a rule of court, the indictment being quashed on a different ground and one not taken by the defendant.

THE facts, which involve the jurisdiction of the District Court to grant new trials during or after the term, are stated in the opinion.

Mr. Charles B. Parkhill for appellant.

Mr. Assistant Attorney General William Wallace, Jr., for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is an appeal from a final order discharging a writ of *habeas corpus* and remanding appellant to the custody of the United States Marshal. The facts are as follows: Appellant was indicted in the United States District Court for the Southern District of Florida, at Tampa,

for a violation of a section of the Criminal Code, and in the month of March, 1912, was tried and found guilty. On the twelfth day of the same month he was sentenced to confinement in the penitentiary at Atlanta for the term of one year and six months. On the same day, and after passing the sentence, the court entered the following order: "Ordered that court be adjourned in accordance with General Rule No. 1, and all orders and other matters be entered as of the term. Thereupon court is adjourned as ordered." After the entry of this order, Judge Locke, the district judge, went to Jacksonville, in the same district, and the deputy clerk noted on the minutes from day to day that court was open in accordance with General Rule No. 1, after which he entered orders made from time to time by the court in vacation. On May 24, 1912, appellant filed a motion for a new trial upon the ground of newly discovered evidence, with several affidavits in support of it. On June 26 Judge Locke, at Jacksonville, granted this motion, and made a proper order, pursuant to which appellant was brought to trial on February 11, 1913, when the jury disagreed. He was again tried on March 13, 1914, and the jury returned a verdict of not guilty. Thereafter, and in February, 1915, the persons who had made the affidavits in support of the motion for a new trial were indicted for perjury, and appellant was indicted for subornation of perjury. Appellant demurred to this indictment and moved to quash it upon the ground that Judge Locke had no jurisdiction to grant a new trial because the motion was not filed within four days after the verdict. The demurrer and motion to quash were heard by the then presiding judge, who sustained the demurrer and quashed the indictment upon the ground that Judge Locke had no power or authority, after the making of the adjournment order of March 12, 1912, to vacate or set aside the sentence passed upon appellant on that date.

Thereafter, and on March 20, 1915, the Government procured a commitment to be issued upon the original judgment of conviction, and it is under this writ that appellant is now held in custody.

Two questions arise: (1) Were the order for a new trial, and the trial proceedings had thereunder, null and void? (2) If not, should they nevertheless be so regarded as against appellant, because of what he did in obtaining the quashing of the indictment for subornation of perjury?

Under the first head, counsel for appellee cites a rule of the district court reading thus: "Motions for new trials shall be made within four days after the entry of the verdict, during which time no judgment shall be entered, except by leave of court," etc. We find in the record no evidence that there was such a rule; but, assuming we may take judicial notice of its existence, it was a mere regulation of practice, and a breach of it would be, at the utmost, a mere error of procedure, not affecting the jurisdiction.

The principal insistence, and the ground upon which the court rested the decision that is now under review, is that the adjournment order of March 12 brought the term to an end, so far as criminal business was concerned, and left the court without jurisdiction to entertain the motion of May 24 or grant a new trial thereon, because a court of law cannot set aside or alter its final judgment after the expiration of the term at which it was rendered, except pursuant to an application made within the term. *United States* v. *Mayer*, 235 U. S. 55, 67.

The order of March 12 must be read in connection with the General Rule to which it refers, and this must be interpreted in the light of the law regulating the terms and the business of the court. General Rule No. 1 is as follows:

"The law requiring the court to be always open for the transaction of certain kinds of business which may be

transacted under the statutes, and under the orders of the judge who may at the time be absent from the place in which the court is held, and which business can be transacted by the clerk under the orders of the judge, and is transacted from day to day in the court, it is ordered that, pending the temporary absence of the presiding judge of this district from the district, or the division of the district in which business is presented to be transacted, the clerk be present, either by himself or his deputy, daily, for the transaction of business, and upon such days as there is business to be transacted the court be opened, and that a record of the same be entered upon each of said days upon the minutes."

The provisions of law referred to are to be found in the Judicial Code (act of March 3, 1911, c. 231; 36 Stat. 1087, 1108), of which § 76 divides the State of Florida into two districts, northern and southern, and provides: "Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction."

Other sections to be considered are: Section 9 (§§ 574 and 638, Rev. Stat.), which declares that the District Courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing pleadings, issuing and returning process, and making interlocutory motions, orders, etc., preparatory to the hearing upon the merits; § 10 (§ 578, Rev. Stat.), requiring such courts to hold monthly adjournments of their regular terms for the trial of criminal causes when the business requires it;

and § 11 (§ 581, Rev. Stat.), which declares that a special term of the District Court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge, and that any business may be transacted at such special term which might be transacted at a regular term.

The provision of § 76 which requires the District Court to be open at all times for the purpose of hearing and deciding admiralty causes traces its origin to the act of February 23, 1847 (c. 20; 9 Stat. 131), which established the southern district of Florida, evidently for the especial purpose of disposing of admiralty business; and this particular provision was carried into the Revised Statutes as § 575. It covers the *hearing and deciding* of admiralty causes, while the provision now found in § 9, Jud. Code (§§ 574 and 638, Rev. Stat.), which originated in an act of August 23, 1842 (c. 188, § 5; 5 Stat. 517), relates to interlocutory proceedings "*preparatory to the hearing.*"

The statutory provisions referred to are designed to render the District Courts readily accessible to applicants for justice in all branches of the jurisdiction; and while they *require* those courts to be always open only as courts of admiralty and as courts of equity, they *permit* "special terms" to be held at any time for the transaction of any kind of business.

The celebrated remark of Lord Eldon: "The Court of Chancery is always open," (*Temple* v. *Bank of England*, 6 Ves. Jun. 770, 771), evidenced the great adaptability of the practice of that court to the needs of litigants; and modern legislation has shown a strong tendency to reform the practice of common law courts by facilitating the transaction of their business in vacation. The sections we have quoted from the Judicial Code indicate a policy of avoiding the hardships consequent upon a closing

of the court during vacations. The General Rule in question was evidently designed to carry out this policy and should receive a liberal interpretation consonant with its spirit: that is, as keeping the term alive, by adjournments from day to day, pending the temporary absence of the presiding judge, so that court might and should be actually opened upon such days as there was business of any character to be transacted. Thus interpreted, its effect was not different from that of the rule which this court, in *Harlan* v. *McGourin*, 218 U. S. 442, 449, 450, construed as keeping the court open from the beginning of one statutory term until the beginning of the next. Judge Locke so construed the General Rule and the adjournment order made under it, when he entertained and granted the motion for new trial filed May 24, 1912, and we are satisfied that he committed no jurisdictional error in so doing. It is obvious that the order for a new trial necessarily vacated the sentence of March 12, 1912, and that the subsequent acquittal of appellant exhausted the power of the court under the first indictment.

Nor is appellant, in our opinion, estopped to assert the jurisdiction of Judge Locke to entertain the motion for a new trial. The estoppel is sought to be based upon the position he is said to have taken in demurring to and moving to quash the indictment for subornation of perjury. The record shows, however, that the demurrer and motion were based upon the ground that the motion for new trial was not filed within four days after verdict. This was true in fact, but the court in effect held it not well founded in law; for it proceeded to sustain the demurrer and quash the indictment upon another ground, and one not taken by appellant, viz., that the adjournment order of March 12, 1912, brought the term to a conclusion and deprived Judge Locke of power to set aside the final judgment and sentence passed upon ap-

pellant on that day. The fundamental ground of an estoppel is wanting, and we need not weigh other considerations that might operate against it.

The judgment of conviction having been vacated by an order of the court made within the scope of its power and jurisdiction, there remains no legal foundation for the commitment issued on March 20, 1915, and appellant is entitled to be discharged from custody.

Final order reversed, and the cause remanded for further proceedings in conformity with this opinion.

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.